

67B Am. Jur. 2d Sales and Use Taxes II A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

A. Overview of Use Taxes

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3603](#), [3609](#), [3611](#), [3639](#), [3689](#), [3692](#)

A.L.R. Library

A.L.R. Index, Sales and Use Taxes

West's A.L.R. Digest, [Taxation](#)  [3603](#), [3609](#), [3611](#), [3639](#), [3689](#), [3692](#)

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 135

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

A. Overview of Use Taxes

1. In General

§ 135. Use taxes, generally; nature, description, and purpose

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:1 \(2d ed.\)](#) (Nature and development of sales and use tax)
[Hartman and Trost, Federal Limitations on State and Local Tax § 11:6 \(2d ed.\)](#) (Compensating use taxes incident to interstate sales)

Forms

[Am. Jur. Pleading and Practice Forms, Sales and Use Taxes §§ 17 to 25](#) (Use taxes)

A "use" tax, sometimes referred to as a "compensating" tax,¹ taxes the privilege of using, storing, or otherwise consuming tangible personal property or services,² usually at a rate equivalent to the sales tax.³

Use taxes generally are considered to be a form of excise⁴ or privilege tax⁵ and are considered neither property taxes⁶ nor ad valorem taxes.⁷

The use tax is designed to reach out-of-state sales of tangible personal property to in-state purchasers.⁸ The use tax is designed to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices.⁹ It is designed to preclude the avoidance of the sales tax.¹⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Matter of BHCMC, L.L.C., 307 Kan. 154, 408 P.3d 103 \(2017\); Tucson Electric Power Co. v. Taxation and Revenue Department, 2020-NMCA-011, 456 P.3d 1085 \(N.M. Ct. App. 2019\).](#)
- 2 [State Department of Revenue v. Kelly's Food Concepts of Alabama, LLP, 157 So. 3d 944 \(Ala. Civ. App. 2014\); Matter of BHCMC, L.L.C., 307 Kan. 154, 408 P.3d 103 \(2017\); Ford Motor Co. v. Department of Treasury, 313 Mich. App. 572, 884 N.W.2d 587 \(2015\); Black Hills Truck & Trailer, Inc. v. South Dakota Dept. of Revenue, 2016 SD 47, 881 N.W.2d 669 \(S.D. 2016\).](#)
- 3 [§ 201.](#)
- 4 [State Department of Revenue v. Kelly's Food Concepts of Alabama, LLP, 157 So. 3d 944 \(Ala. Civ. App. 2014\); Commonwealth v. Interstate Gas Supply, Inc. for Use and Benefit of Tri-State Healthcare Laundry, Inc., 554 S.W.3d 831 \(Ky. 2018\); Black Hills Truck & Trailer, Inc. v. South Dakota Dept. of Revenue, 2016 SD 47, 881 N.W.2d 669 \(S.D. 2016\).](#)
[As to excise taxes, generally, see Am. Jur. 2d, State and Local Taxation §§ 23, 24.](#)
- 5 [Ex parte Fleming Foods of Alabama, Inc., 648 So. 2d 577 \(Ala. 1994\); Winslow Const. Co. v. City and County of Denver, 960 P.2d 685 \(Colo. 1998\); People ex rel. Lindblom v. Sears Brands, LLC, 2019 IL App \(1st\) 180588, 436 Ill. Dec. 606, 143 N.E.3d 101 \(App. Ct. 1st Dist. 2019\), appeal denied, 433 Ill. Dec. 510, 132 N.E.3d 348 \(Ill. 2019\); Department of Revenue v. Advanced H2O, LLC, 11 Wash. App. 2d 384, 453 P.3d 1011 \(Div. 2 2019\).](#)
- 6 [Kartridg Pak Co. v. Department of Revenue, 362 N.W.2d 557 \(Iowa 1985\); MCI Telecommunications Corp. v. Department of Treasury, Revenue Div., 136 Mich. App. 28, 355 N.W.2d 627 \(1984\); Philips Industries, Inc. v. Limbach, 37 Ohio St. 3d 100, 524 N.E.2d 161 \(1988\).](#)
[As to the nature of property taxes, generally, see Am. Jur. 2d, State and Local Taxation §§ 20 to 22.](#)
- 7 [Winslow Const. Co. v. City and County of Denver, 960 P.2d 685 \(Colo. 1998\); Philips Industries, Inc. v. Limbach, 37 Ohio St. 3d 100, 524 N.E.2d 161 \(1988\).](#)
[As to ad valorem taxes, generally, see Am. Jur. 2d, State and Local Taxation § 18.](#)
- 8 [Carter Oil Company, Inc. v. Arizona Department of Revenue, 248 Ariz. 339, 460 P.3d 808 \(Ct. App. Div. 1 2020\); Southern California Edison v. State Department of Taxation, 133 Nev. 348, 398 P.3d 896 \(2017\), cert. denied, 138 S. Ct. 746, 199 L. Ed. 2d 607 \(2018\); Matkovich v. CSX Transportation, Inc., 238 W. Va. 238, 793 S.E.2d 888 \(2016\).](#)
- 9 [Horsehead Corporation v. Department of Revenue, 2019 IL 124155, 2019 WL 6199641 \(Ill. 2019\); Victor Bravo Aviation, LLC v. State Tax Assessor, 2011 ME 50, 17 A.3d 1237 \(Me. 2011\).](#)
- 10 [Erdman Dairy, Inc. v. Illinois Department of Revenue, 427 Ill. Dec. 421, 118 N.E.3d 622 \(App. Ct. 4th Dist. 2018\); Hoosier Roll Shop Services, LLC v. Indiana Dept. of State Revenue, 10 N.E.3d 1051 \(Ind. Tax Ct. 2014\); WMS Gaming, Inc. v. Sullivan, 6 A.3d 1104 \(R.I. 2010\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 136

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

A. Overview of Use Taxes

1. In General

§ 136. Relation of use tax to sales tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:1 \(2d ed.\)](#) (Nature and development of sales and use tax)

While both sales taxes and use or compensating taxes generally are considered excise or privilege taxes,¹ the two taxes are distinct.² In essence, a sales tax is a tax on the freedom of purchase, while a use tax is a tax on the enjoyment of that which has been purchased.³ In contrast to a sales tax, for which the sale of an item is the taxable event, the compensating use tax is pegged to the use, storage, or consumption of property within the state.⁴

Sales and use taxes generally are designed by the legislature to form an integrated whole⁵ and are construed together by the courts.⁶ The use tax is correlative of and is complementary and supplemental to the sales tax,⁷ one of its principal purposes being to prevent the evasion of the sales tax.⁸ As such, property on which the sales tax paid is generally not subject to the use tax.⁹ Sales and use taxes are complementary, yet mutually exclusive.¹⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 § 135.
- 2 U.S. v. Boyd, 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964); *Steelcase, Inc. v. Crystal*, 238 Conn. 571, 680 A.2d 289 (1996); *Columbia Gulf Transmission Co. v. Bridges*, 28 So. 3d 1032 (La. Ct. App. 1st Cir. 2009), writ denied, 31 So. 3d 371 (La. 2010) and writ denied, 31 So. 3d 369 (La. 2010); *Dahlberg Hearing Systems, Inc. v. Commissioner of Revenue*, 546 N.W.2d 739 (Minn. 1996); *Koch Fuels, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1993 OK 140, 862 P.2d 471 (Okla. 1993).
- 3 § 7.
- 4 Matter of BHCMC, L.L.C., 307 Kan. 154, 408 P.3d 103 (2017).
- 5 Ex parte Fleming Foods of Alabama, Inc., 648 So. 2d 577 (Ala. 1994); *Sharper Image Corp. v. Miller*, 240 Conn. 531, 692 A.2d 774 (1997); *Matter of Hawaiian Flour Mills, Inc.*, 76 Haw. 1, 868 P.2d 419 (1994).
Because a use tax is generally levied to compensate the taxing state for its incapacity to reach the corresponding sale, it is commonly paired with a sales tax and is applicable only when no sales tax has been paid or subject to a credit for any such tax paid. *Irwin Indus. Tool Co. v. Illinois Dept. of Revenue*, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).
- 6 § 165.
- 7 Victor Bravo Aviation, LLC v. State Tax Assessor, 2011 ME 50, 17 A.3d 1237 (Me. 2011); *Black Hills Truck & Trailer, Inc. v. South Dakota Dept. of Revenue*, 2016 SD 47, 881 N.W.2d 669 (S.D. 2016).
- 8 Indiana Dept. of State Revenue v. AOL, LLC, 963 N.E.2d 498 (Ind. 2012); *Elias Bros. Restaurants, Inc. v. Treasury Dept.*, 452 Mich. 144, 549 N.W.2d 837 (1996); *Olin Corp. v. Director of Revenue*, 945 S.W.2d 442 (Mo. 1997).
- 9 Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019), cert. denied, 2020 WL 2621731 (U.S. 2020);
Miller Pipeline Corp. v. Indiana Dept. of State Revenue, 52 N.E.3d 973 (Ind. Tax Ct. 2016); *Black Hills Truck & Trailer, Inc. v. South Dakota Dept. of Revenue*, 2016 SD 47, 881 N.W.2d 669 (S.D. 2016); *Department of Revenue v. Advanced H2O, LLC*, 11 Wash. App. 2d 384, 453 P.3d 1011 (Div. 2 2019).
- 10 § 1.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 137

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

A. Overview of Use Taxes

1. In General

§ 137. Property used by nonresident; property purchased for use in another state

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603, 3609

A.L.R. Library

[Use tax on property purchased by nonresident in another state](#), 41 A.L.R.2d 535

That a user of tangible personal property is a foreign corporation or nonresident of the state in which the property is used, stored, or consumed does not render a use tax inapplicable.¹

On the other hand, some states apply their use tax only to the use of property purchased for use within the state, thereby excluding a nonresident's use of property that has not been purchased for use in the state.² To aid in the determination of whether the property has been purchased for use in the state or in some other state, some use-tax statutes contain a presumption that property used in another state for a certain period of time before being imported into the state has not been purchased for use in the state;³ or, conversely, that personal property brought into the state within a certain amount of time after its purchase has been purchased for use in the state.⁴

Practice Tip:

The presumption that property used outside the state for more than a certain amount of time has not been purchased for use within the state can be rebutted by evidence that the property has been used within the state at some point.⁵

In some states, the use tax is applied to property only if the use of that property in the state constitutes its "first use."⁶ Thus, in these states, if the first use of the property occurs in another state, the state can never tax the use of that property.⁷

Under other statutes, the use of property is taxed without regard to whether the property has been purchased for use in the state.⁸ These statutes apply the use tax to property no matter how long after purchase the property has first been used, stored, or consumed in the state or how long it has been used outside the state⁹ or how short a time the property has been used within the taxing jurisdiction.¹⁰

In some states, if tangible personal property is less than a certain number of years old and has originally been purchased for use outside the state but has thereafter been used, stored, or consumed within the state, the use tax is applied but only at the present fair market value of the property.¹¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Towle v. Commissioner of Revenue, 397 Mass. 599, 492 N.E.2d 739 (1986); Lady Frances, LLC v. Director, Div. of Taxation, 24 N.J. Tax 545, 2009 WL 1174979 (2009).
- 2 Towle v. Commissioner of Revenue, 397 Mass. 599, 492 N.E.2d 739 (1986); Matter of Assessment of Additional North Carolina and Orange County Use Taxes Against Village Pub. Corp. for Period from April 1, 1972 through March 31, 1978, 312 N.C. 211, 322 S.E.2d 155 (1984); State, Dept. of Revenue v. Sanborn Telephone Co-op., 455 N.W.2d 223 (S.D. 1990).
- 3 United Engines, Inc. v. Department of Revenue, 508 So. 2d 459 (Fla. 1st DCA 1987) (six months).
- 4 Towle v. Commissioner of Revenue, 397 Mass. 599, 492 N.E.2d 739 (1986) (six months); Podmajersky v. Department of Treasury, 302 Mich. App. 153, 838 N.W.2d 195 (2013) (90 days).
As to the presumptions applying to use taxes, generally, see § 140.
- 5 United Engines, Inc. v. Department of Revenue, 508 So. 2d 459 (Fla. 1st DCA 1987).
- 6 Harrah's Operating Co. v. State, Dept. of Taxation, 130 Nev. 129, 321 P.3d 850, 130 Nev. Adv. Op. No. 15 (2014); Exxon Corp. v. Wyoming State Bd. of Equalization, 783 P.2d 685 (Wyo. 1989).
- 7 Burlington Northern R. Co. v. Wyoming State Bd. of Equalization, 820 P.2d 993 (Wyo. 1991).
- 8 Sunshine Developers, Inc. v. Tax Com'n of State of N.Y., 132 A.D.2d 752, 517 N.Y.S.2d 317 (3d Dep't 1987); Philips Industries, Inc. v. Limbach, 37 Ohio St. 3d 100, 524 N.E.2d 161 (1988); Republic Airlines, Inc. v. Wisconsin Dept. of Revenue, 159 Wis. 2d 247, 464 N.W.2d 62 (Ct. App. 1990).
- 9 Continental Illinois Leasing Corp. v. Department of Revenue of State of Ill., 108 Ill. App. 3d 583, 64 Ill. Dec. 189, 439 N.E.2d 118 (1st Dist. 1982); Woods v. M.J. Kelley Co., 592 S.W.2d 567 (Tenn. 1980).

- 10 [Diversacon Industries, Inc. v. Graham](#), 429 So. 2d 1269 (Fla. 1st DCA 1983); [Seaboard World Airlines, Inc. v. New York State Tax Com'n](#), 118 A.D.2d 947, 499 N.Y.S.2d 513 (3d Dep't 1986).
- 11 [Matter of Thermoset Plastics, Inc.](#), 473 N.W.2d 136 (S.D. 1991).
As to fair market value as the measure of a use tax, generally, see [§ 202](#).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 138

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

A. Overview of Use Taxes

1. In General

§ 138. Time for determining liability for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3689

The use tax is applicable not upon the passage of the title to the property¹ but upon the delivery of possession to the purchaser within the taxing state² and after the use of the property begins.³

Observation:

Whether personal property is purchased for use in the state within the meaning of a use-tax statute should be determinable at or near the time of its purchase.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

¹ [Colonial Pipeline Co. v. Clayton](#), 275 N.C. 215, 166 S.E.2d 671 (1969).

- 2 D.J.H. Const., Inc. v. Chu, 145 A.D.2d 716, 535 N.Y.S.2d 249 (3d Dep't 1988); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).
- 3 Union Oil Co. of Cal. v. State Bd. of Equalization, 60 Cal. 2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 (1963); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).
- 4 Morrison-Knudsen Co. v. State Tax Commission, 242 Iowa 33, 44 N.W.2d 449, 41 A.L.R.2d 523 (1950); Comptroller of the Treasury v. James Julian, Inc., 215 Md. 406, 137 A.2d 674 (1958).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 139

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

A. Overview of Use Taxes

1. In General

§ 139. Municipal and other local use taxes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3611

Counties, cities, towns, and other political subdivisions often are granted, by state law, a permissive right to impose a use tax on tangible personal property used within their jurisdiction.¹ When this right is granted, it may be restricted to taxing the use of tangible personal property titled or registered with an agency of the state government,² taxing the same types of items and transactions as the state sales tax,³ or to a maximum rate specified by the legislature.⁴

Observation:

A local use tax does not supplant any portion of the state use tax and thus increases the total use tax burden on the residents of those jurisdictions imposing the optional tax.⁵

Municipal use tax laws or ordinances have usually been upheld as against the occasional questions which have arisen as to their validity under the applicable laws governing municipal powers of taxation.⁶ The constitutions of some states allow for

the imposition of municipal taxes by home-rule cities⁷ and even allow the municipal law's provisions to supersede similar provisions of the state use-tax statutes.⁸

Practice Tip:

Although a local use tax is imposed only at the option of the local government, the state collects the local option tax along with the state use tax and remits the proceeds of the local tax back to the governmental entity imposing it.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 CNG Dev. Co. v. Limbach, 63 Ohio St. 3d 28, 584 N.E.2d 1180 (1992); Millard County v. Utah State Tax Com'n ex rel. Intermountain Power Agency, 823 P.2d 459 (Utah 1991); Board of Directors of Tuckahoe Ass'n, Inc. v. City of Richmond, 257 Va. 110, 510 S.E.2d 238 (1999).
As to the power of a home rule municipality to tax, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 118.
As to the delegation of taxing power from a state to its political subdivisions, generally, see Am. Jur. 2d, State and Local Taxation § 97.
- 2 Archer Daniels Midland Co. v. Department of Revenue, 170 Ill. App. 3d 1014, 120 Ill. Dec. 828, 524 N.E.2d 1010 (1st Dist. 1988).
- 3 C.W. Matthews Contracting Co. v. Collins, 265 Ga. 448, 457 S.E.2d 171 (1995).
- 4 Circle Food Stores, Inc. v. City of New Orleans, 620 So. 2d 281 (La. 1993).
Any local governmental sales and use taxes that exceed 3 percent are invalid and unconstitutional unless authorized by the legislature and approved by the voters. Parish of Iberville Sales Tax Dept. v. City of St. Gabriel, 21 So. 3d 955 (La. Ct. App. 1st Cir. 2009).
- 5 Millard County v. Utah State Tax Com'n ex rel. Intermountain Power Agency, 823 P.2d 459 (Utah 1991).
- 6 Boyd v. Weiss, 333 Ark. 684, 971 S.W.2d 237 (1998); Atlantic Gulf & Pac. Co. v. Gerosa, 16 N.Y.2d 1, 261 N.Y.S.2d 32, 209 N.E.2d 86 (1965).
As to the constitutionality of use tax laws, generally, see §§ 144 to 162.
- 7 Winslow Const. Co. v. City and County of Denver, 960 P.2d 685 (Colo. 1998); Village of Sauget v. Cohn, 241 Ill. App. 3d 640, 182 Ill. Dec. 680, 610 N.E.2d 104 (5th Dist. 1993).
As to home-rule municipalities, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 109, 110.
- 8 Winslow Const. Co. v. City and County of Denver, 960 P.2d 685 (Colo. 1998).
- 9 Millard County v. Utah State Tax Com'n ex rel. Intermountain Power Agency, 823 P.2d 459 (Utah 1991).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 140

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes


A. Overview of Use Taxes

1. In General

§ 140. Presumptions and burden of proof regarding use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603, 3692

In some states, the use tax law includes presumptions to aid in the proper administration of the use tax act and to prevent evasion of the tax.¹ Under some statutes, a presumption prevails that every use of tangible personal property in the state is taxable.² Furthermore, use tax statutes create a presumption that property purchased out-of-state and brought into the state is intended for storage, use, or consumption within the state, so as to be subject to the use tax, and the taxpayer has the burden of rebutting that presumption.³ The burden of proving that a transaction is not subject to the use tax is imposed upon the person charged with the tax liability.⁴

Other statutes create a presumption that property has or has not been "purchased for use" in the state based on the length of time the property has been used inside or outside the state.⁵

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Montgomery Ward & Co. v. State Bd. of Equalization](#), 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1st Dist. 1969).
- 2 [Ball Corp. v. Limbach](#), 62 Ohio St. 3d 474, 584 N.E.2d 679 (1992).
- 3 [Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue](#), 242 Ariz. 85, 393 P.3d 146 (Ct. App. Div. 1 2017); [Gracie, LLC v. Idaho State Tax Com'n](#), 149 Idaho 570, 237 P.3d 1196 (2010); [Podmajersky v. Department of Treasury](#), 302 Mich. App. 153, 838 N.W.2d 195 (2013).
- 4 [Miller Pipeline Corp. v. Indiana Dept. of State Revenue](#), 52 N.E.3d 973 (Ind. Tax Ct. 2016); [Bay Mechanical & Elec. Corp. v. Testa](#), 133 Ohio St. 3d 423, 2012-Ohio-4312, 978 N.E.2d 882 (2012).

5

As to the construction of use-tax statutes, generally, see §§ 163 to 166.
§ 137.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 141

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes


A. Overview of Use Taxes

2. Definitions Relating to Use Taxes

§ 141. Activities constituting "use" subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603, 3639

A "use," subject to taxation, is often defined by statute as the exercise of any right or power over tangible personal property incident to the ownership, possession, or enjoyment of that property.¹ The statutory definition of "use" thus includes two elements: the taxpayer must: (1) own, possess, or enjoy the property in the taxing state;² and (2) exercise some right or power over the tangible personal property in the taxing state.³

Observation:

The concept of "use" is not confined to the physical manipulation of property.⁴

The term "use" is statutorily defined as the exercise by any person of any right or power over tangible personal property incident to the ownership of that property. Storage of tangible personal property qualifies as a use of that property, because placing property in storage and maintaining the storage of that property represents an exercise of rights and power over the property that belongs only to the owner of the property. It goes without saying that a person who has no ownership interest in a piece

of property cannot choose to put the property into storage or dictate how long said property will remain in storage; that power belongs uniquely to the owner of the property.⁵

When activities such as "storage" or "other consumption" are not included with "use" among the activities upon which a use tax expressly is imposed, the term "use" nonetheless may be construed to include the storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to any real or personal property, any consumption of such property,⁶ the receipt of tangible personal property,⁷ or transportation of the property.⁸

On the other hand, certain activities may be expressly excluded from the definition of "use," such as the storage of property,⁹ the sale of property in the regular course of business,¹⁰ or the use of property while transporting it outside the state for use thereafter solely outside the state.¹¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Bell & Pollock, P.C. v. City of Littleton](#), 910 P.2d 69 (Colo. App. 1995); [John Swenson Granite, Inc. v. State Tax Assessor](#), 685 A.2d 425 (Me. 1996); [Am. Cyanamid Co. v. Tracy](#), 74 Ohio St. 3d 468, 1996-Ohio-133, 659 N.E.2d 1263 (1996).
- 2 [Victor Bravo Aviation, LLC v. State Tax Assessor](#), 2011 ME 50, 17 A.3d 1237 (Me. 2011); [Koch Fuels, Inc. v. State ex rel. Oklahoma Tax Com'n](#), 1993 OK 140, 862 P.2d 471 (Okla. 1993).
Planning, setting goals, and other similar determinations regarding tangible personal property are certainly rights or powers inherent in the ownership of property, but decision-making is not an exercise of a right or power that alone would subject a property to the use tax. [Zimmer, Inc. v. Indiana Department of State Revenue](#), 72 N.E.3d 1031 (Ind. Tax Ct. 2017).
- 3 [Matter of BHCMC, L.L.C.](#), 307 Kan. 154, 408 P.3d 103 (2017); [Victor Bravo Aviation, LLC v. State Tax Assessor](#), 2011 ME 50, 17 A.3d 1237 (Me. 2011); [Paul Nelson Farm v. South Dakota Dept. of Revenue](#), 2014 SD 31, 847 N.W.2d 550 (S.D. 2014).
- 4 [J.C. Penney Co., Inc. v. Olsen](#), 796 S.W.2d 943 (Tenn. 1990).
- 5 [Shared Imaging, LLC v. Hamer](#), 2017 IL App (1st) 152817, 416 Ill. Dec. 416, 84 N.E.3d 398 (App. Ct. 1st Dist. 2017).
As to what constitutes "storage" subject to use tax, see § 142.
- 6 [Cosmair, Inc. v. Director, New Jersey Div. of Taxation](#), 109 N.J. 562, 538 A.2d 788 (1988); [Vermont Structural Steel v. State Dept. of Taxes](#), 153 Vt. 67, 569 A.2d 1066 (1989).
As to the meaning of "storage" of property subject to use tax, see § 142.
- 7 [D.J.H. Const., Inc. v. Chu](#), 145 A.D.2d 716, 535 N.Y.S.2d 249 (3d Dep't 1988).
- 8 [Goodwin Volkswagon, Inc. v. Com.](#), 135 Pa. Commw. 495, 582 A.2d 68 (1990).
- 9 [R & M Enterprises, Inc. v. Director of Revenue](#), 748 S.W.2d 171 (Mo. 1988) (overruled on other grounds by, [House of Lloyd, Inc. v. Director of Revenue](#), 884 S.W.2d 271 (Mo. 1994)).
- 10 [Phillips v. Oklahoma Tax Commission](#), 1978 OK 34, 577 P.2d 1278 (Okla. 1978); [Commonwealth, Dept. of Taxation v. Miller-Morton Co.](#), 220 Va. 852, 263 S.E.2d 413 (1980).
- 11 [Wisconsin Dept. of Revenue v. Moebius Printing Co.](#), 89 Wis. 2d 610, 279 N.W.2d 213 (1979).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 142

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes


A. Overview of Use Taxes

2. Definitions Relating to Use Taxes

§ 142. Activities constituting "storage" subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603, 3639

When a use tax is imposed expressly on the "storage" of tangible personal property, the term "storage" often is defined as any keeping or retention in the state of tangible personal property¹ for any purpose except sale in the regular course of business.² However, in some states, a taxpayer is liable for the use tax on the storage of equipment purchased and stored in the taxing state well before its subsequent installation in another state.³

Practice Tip:

In such a situation, the taxpayer should address any claims for tax credits to the jurisdiction in which the equipment is subsequently installed.⁴

The term "storage" may be limited by exceptions similar to those limiting the term "use,"⁵ such as an exception for the keeping or retention of tangible personal property in the state for subsequent use outside the state.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Master Craft Engineering, Inc. v. Department of Treasury](#), 141 Mich. App. 56, 366 N.W.2d 235 (1985); [PPG Industries, Inc. v. Tracy](#), 74 Ohio St. 3d 449, 1996-Ohio-116, 659 N.E.2d 1250 (1996); [Wisconsin Dept. of Revenue v. J. C. Penney Co., Inc.](#), 108 Wis. 2d 662, 323 N.W.2d 168 (Ct. App. 1982).
- 2 [Chicago Bridge & Iron Co. v. Johnson](#), 19 Cal. 2d 162, 119 P.2d 945 (1941).
- 3 [Broadcast Intern., Inc. v. Utah State Tax Com'n](#), 882 P.2d 691 (Utah Ct. App. 1994).
- 4 [Broadcast Intern., Inc. v. Utah State Tax Com'n](#), 882 P.2d 691 (Utah Ct. App. 1994).
- 5 § 141.
- 6 [Miles, Inc. v. Indiana Dept. of State Revenue](#), 659 N.E.2d 1158 (Ind. Tax Ct. 1995); [Hasbro Industries, Inc. v. Norberg](#), 487 A.2d 124 (R.I. 1985).
A medical device company's repeated in-state storage and out-of-state use of exhibition booth components was consistent with the statutory exclusion of storage for subsequent use solely outside Indiana and was not subject to use tax on that basis. [Zimmer, Inc. v. Indiana Department of State Revenue](#), 72 N.E.3d 1031 (Ind. Tax Ct. 2017).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 143

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes


A. Overview of Use Taxes

2. Definitions Relating to Use Taxes

§ 143. Activities constituting "consumption" subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3603, 3639

When a use tax is imposed specifically on the "use, storage, or other consumption" of tangible personal property, the words "other consumption" are supplementary, not surplusage, to the words "use" and "storage," and significance will be given to them.¹

Definition:

The word "consumption" encompasses a gradual using up or wearing away of something.²

"Other consumption," when included with "use" among the activities expressly subject to the use tax, differs from "use" in that the exercise of consumptive rights or powers over the property renders it, through destruction or deterioration, less useful to others for the same purpose.³ For property to be "otherwise consumed" as distinct from being "used," it must be left without any value.⁴

Footnotes

- 1 [Union Oil Co. of Cal. v. State Bd. of Equalization, 60 Cal. 2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 \(1963\).](#)
- 2 [Union Oil Co. of Cal. v. State Bd. of Equalization, 60 Cal. 2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 \(1963\).](#)
- 3 [Wisconsin Dept. of Revenue v. J. C. Penney Co., Inc., 108 Wis. 2d 662, 323 N.W.2d 168 \(Ct. App. 1982\).](#)
- 4 [Department of Revenue v. Horne Directory, Inc., 105 Wis. 2d 52, 312 N.W.2d 820 \(1981\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes II B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Taxation](#) 🔑 3609, 3621, 3626 to 3634

A.L.R. Library

A.L.R. Index, Sales and Use Taxes

West's A.L.R. Digest, [Taxation](#) 🔑 3609, 3621, 3626 to 3634

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 144

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

1. In General

§ 144. Constitutionality of statute imposing use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3621, 3626 to 3634

A.L.R. Library

[Validity, Construction, and Application of Sales, Use, and Utility Taxes on Retail Transactions of Internet Sellers and Internet Access Providers, 30 A.L.R.6th 341](#)

The power of the legislature to levy use taxes has long withstood constitutional challenge.¹ Tax statutes, with their heavy presumption of constitutionality, are upheld as long as they bear a rational relationship to a legitimate state purpose.²

A constitutional provision which prohibits the legislature from delegating the power to tax to a private body is applicable to the imposition of use taxes.³

Caution:

When a provision of a use tax is found to violate a constitutional principle, the tax will not necessarily be struck down in its entirety.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Scholastic Book Clubs, Inc. v. State Bd. of Equalization, 207 Cal. App. 3d 734, 255 Cal. Rptr. 77, 51 Ed. Law Rep. 569 (1st Dist. 1989); Bert v. Director of Revenue, 935 S.W.2d 319 (Mo. 1996).
As to the principles governing the constitutionality of state and local tax statutes, generally, see Am. Jur. 2d, State and Local Taxation §§ 67 to 117.
- 2 National Ass'n of Independent Insurers v. State, 207 A.D.2d 191, 620 N.Y.S.2d 448 (2d Dep't 1994), order aff'd, 89 N.Y.2d 950, 655 N.Y.S.2d 853, 678 N.E.2d 465 (1997).
- 3 Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority, 40 Cal. App. 4th 1359, 48 Cal. Rptr. 2d 269 (5th Dist. 1995), as modified on denial of reh'g, (Jan. 10, 1996).
- 4 Associated Industries of Missouri v. Lohman, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 145

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes


B. Constitutionality of Statute Imposing Use Tax

1. In General

§ 145. Subject and title of statute imposing use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#)

A provision of a state constitution that requires that every law imposing a tax to distinctly state the object of the tax applies to tax levies by municipalities. However, the failure to state the object of a municipal sales tax in a ballot does not run afoul of such a constitutional provision.¹

Observation:

The intent of a constitutional provision requiring statutes imposing taxes to distinctly state the object of the tax is for the object to be stated so that tax revenues cannot be shifted to a use different from that authorized.²

A use tax law is not objectionable on the ground that the title of the act does not express its object in accordance with constitutional provisions when the title of the act in question recites that it is an act to provide for the levy, assessment, and collection of a specific excise tax on the storage, use, or consumption in the state of tangible personal property; to appropriate the proceeds thereof; and to prescribe penalties for violations of the act's provisions.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Oldner v. Villines, 328 Ark. 296, 943 S.W.2d 574 \(1997\).](#)
- 2 [Oldner v. Villines, 328 Ark. 296, 943 S.W.2d 574 \(1997\).](#)
- 3 [Banner Laundering Co. v. Gundry, 297 Mich. 419, 298 N.W. 73 \(1941\); Boeing Co. v. Omdahl, 169 N.W.2d 696 \(N.D. 1969\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 146

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

1. In General

§ 146. Retroactivity of use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3634

That a use tax has a retroactive effect is not sufficient by itself to establish its unconstitutionality. Generally, in the absence of a constitutional provision expressly forbidding retroactive legislation, such a tax statute is not unconstitutional if it is not arbitrary or unreasonably discriminatory so long as it does not otherwise violate due process of law, disturb vested rights, or impair the obligations of contracts.¹

Observation:

A statute imposing a use tax for four years before the statute became effective is unconstitutional as exceeding the limit of permissible retroactivity.²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Maples v. McDonald](#), 668 So. 2d 790 (Ala. Civ. App. 1995).
An amendment to a sales- and use-tax statute that required a taxpayer to file use-tax reports for purchases from out-of-state vendors upon which no sales tax had been paid applied retroactively to those tax years three years before the amendment's effective date; however, the retroactivity provision did not serve to reopen the tax years outside of the three-year period because those tax years were forever closed to the Department of Revenue at the time the act became effective. [IEC Arab Alabama, Inc. v. City of Arab](#), 7 So. 3d 370 (Ala. Civ. App. 2008).
As to due process considerations, see § 150.
- 2 [Northern Pac. Ry. Co. v. Henneford](#), 9 Wash. 2d 18, 113 P.2d 545 (1941).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 147

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

1. In General

§ 147. Effect of state imposts and duties on use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3621, 3626 to 3633

The United States Constitution provides that no state will, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.¹ The Import-Export Clause, which refers to property imported from or exported to foreign countries and not to other states of the Union,² has been recognized in connection with use taxes.³ The federal provision has been found not violated by a tax on the use of property imported from another country.⁴

While the Import-Export Clause precludes a state tax upon the importation of goods or the sale of imported goods unused and in their original package,⁵ such a clause does not prohibit the imposition of a use tax upon the first use after the goods cease to be imports under the original-package doctrine.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Am. Jur. 2d, State and Local Taxation § 74.](#)
- 2 [Am. Jur. 2d, State and Local Taxation § 74.](#)
- 3 [Powell v. Maxwell, 210 N.C. 211, 186 S.E. 326 \(1936\).](#)
- 4 [Boeing Co. v. Omdahl, 169 N.W.2d 696 \(N.D. 1969\).](#)
- 5 [Am. Jur. 2d, State and Local Taxation § 75.](#)
- 6 [Caterpillar Tractor Co. v. Department of Revenue, 47 Ill. 2d 278, 265 N.E.2d 675 \(1970\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 148

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

1. In General

§ 148. Effect of double or multiple taxation on use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3630

Double taxation occurs either when the same taxing authority imposes a use tax and some other tax with respect to the same property during the same taxing period¹ or when the same property is subject to a use tax in one state and some other tax in another state.²

Reminder:

Generally, property on which the sales tax is paid is not subject to the use tax.³

While a use tax that results in double taxation by the same taxing authority is not unconstitutional,⁴ the courts will not impose a double taxation burden on a taxpayer absent a clearly expressed legislative intent.⁵

Observation:

The convention against double taxation by the same taxing authority is intended to avoid tax pyramiding which occurs when a state imposes a use tax on a product at the preresale stage and a sales tax on the final sale of the product to the ultimate consumer, thereby taxing the transactions of successive pairs of buyers and sellers in the stream of commerce. This kind of double taxation does not result from the imposition of a use tax on a retailer for the use of accessory items in its business despite the fact that the retailer passes along the cost of the use tax to its customers.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Clark Oil & Refining Corp. v. Johnson](#), 154 Ill. App. 3d 773, 107 Ill. Dec. 307, 506 N.E.2d 1362 (1st Dist. 1987); [Ameritech Pub., Inc. v. Department of Treasury](#), 281 Mich. App. 132, 761 N.W.2d 470 (2008); [Aetna Burglar & Fire Alarm Co. v. Director, Div. Of Taxation](#), 16 N.J. Tax 584, 1997 WL 528649 (1997).
- 2 [Revenue Cabinet v. Ashland Oil, Inc.](#), 888 S.W.2d 701 (Ky. Ct. App. 1994); [Covenco, Inc. v. Com.](#), 134 Pa. Commw. 314, 579 A.2d 434 (1990), order aff'd, 530 Pa. 206, 607 A.2d 1077 (1992).
As to double taxation by state and local taxing authorities, generally, see [Am. Jur. 2d, State and Local Taxation](#) §§ 25 to 34.
- 3 [§ 136](#).
- 4 [GTE Automatic Elec. v. Director of Revenue, State of Mo.](#), 780 S.W.2d 49 (Mo. 1989) (overruled on other grounds by, [Southwestern Bell Tel. Co. v. Director of Revenue](#), 78 S.W.3d 763 (Mo. 2002)).
- 5 [GTE Automatic Elec. v. Director of Revenue, State of Mo.](#), 780 S.W.2d 49 (Mo. 1989) (overruled on other grounds by, [Southwestern Bell Tel. Co. v. Director of Revenue](#), 78 S.W.3d 763 (Mo. 2002)); [Greystone Catering Co., Inc. v. South Carolina Dept. of Revenue and Taxation](#), 326 S.C. 551, 486 S.E.2d 7 (Ct. App. 1997).
- 6 [Covenco, Inc. v. Com.](#), 134 Pa. Commw. 314, 579 A.2d 434 (1990), order aff'd, 530 Pa. 206, 607 A.2d 1077 (1992).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 149

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

1. In General

§ 149. Effect of double or multiple taxation on use tax—Taxation of interstate commerce

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3630

A use tax that results in the taxation of interstate commerce by multiple states is unconstitutional.¹ Two methods of structuring a use tax have been developed to ameliorate the risk of cumulative tax burdens upon interstate transactions.² First, multiple taxation may be avoided by a use tax credit which provides an offset or exemption if a sales or use tax has been paid to another state or jurisdiction.³ Second, the use tax burden may be apportioned in conformity with a formula that rationally relates the amount of the tax to the fraction of interstate activity taking place within the taxing state.⁴

Practice Tip:

The burden is on the taxpayer to demonstrate that the imposition of a use tax poses a risk of multiple taxation of interstate commerce.⁵

- 1 Revenue Cabinet v. Ashland Oil, Inc., 888 S.W.2d 701 (Ky. Ct. App. 1994); Great American Airways
v. Nevada State Tax Com'n, 101 Nev. 422, 705 P.2d 654 (1985); Frank W. Whitcomb Const. Corp. v.
Commissioner of Taxes, 144 Vt. 466, 479 A.2d 164 (1984).
As to the validity of use taxes under the Commerce Clause, see §§ 155 to 159.
As to double taxation by state and local taxing authorities, generally, see Am. Jur. 2d, State and Local
Taxation §§ 25 to 34.
- 2 Frank W. Whitcomb Const. Corp. v. Commissioner of Taxes, 144 Vt. 466, 479 A.2d 164 (1984).
- 3 Rainforest Cafe, Inc. v. Department of Revenue Services, 293 Conn. 363, 977 A.2d 650 (2009); Revenue
Cabinet v. Ashland Oil, Inc., 888 S.W.2d 701 (Ky. Ct. App. 1994); Frank W. Whitcomb Const. Corp. v.
Commissioner of Taxes, 144 Vt. 466, 479 A.2d 164 (1984).
As to credits for sales or use taxes paid to another state, see § 205.
- 4 Frank W. Whitcomb Const. Corp. v. Commissioner of Taxes, 144 Vt. 466, 479 A.2d 164 (1984).
- 5 Frank W. Whitcomb Const. Corp. v. Commissioner of Taxes, 144 Vt. 466, 479 A.2d 164 (1984).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 150

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

a. In General

§ 150. Effect of due process on constitutionality of use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3609](#), [3621](#), [3626](#) to [3633](#)

To successfully attack a use-tax statute on due process grounds, a failure to satisfy two tests must be shown.¹ First, the object of the use tax must lack a nexus with the state imposing the tax,² and second, the tax must fail to fairly reflect the taxpayer's activity in the taxing state.³ For a use tax to comport with due process, there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and the income attributed to the state for tax purposes must be rationally related to values connected with the taxing State.⁴

Insofar as use taxes are imposed with respect to an attribute of property ownership exercised within the state, they are not open to the objection that they deny due process of law by reason of extraterritorial operation⁵ even as applied to articles purchased outside the state which could not be bought within the state⁶ or to a lease of property in one state for use in another.⁷

A tax may comport with the Due Process Clause yet still violate the Commerce Clause.⁸

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Pacific Power & Light Co. v. Montana Dept. of Revenue](#), 237 Mont. 77, 773 P.2d 1176 (1989).
As to the due process provisions of the United States Constitution, see [Am. Jur. 2d, Constitutional Law](#) §§ 942 to 1024.

- 2 Scripto, Inc. v. Carson, 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960); Montgomery Ward & Co. v.
State Bd. of Equalization, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1st Dist. 1969).
- 3 Pacific Power & Light Co. v. Montana Dept. of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989); Great
American Airways v. Nevada State Tax Com'n, 101 Nev. 422, 705 P.2d 654 (1985).
As to the effect of due process requirements on state and local taxation, generally, see Am. Jur. 2d, State
and Local Taxation § 70.
- 4 Walgreens Specialty Pharmacy, LLC v. Commissioner of Revenue, 916 N.W.2d 529 (Minn. 2018).
- 5 In re Laptops Etc. Corp., 164 B.R. 506 (Bankr. D. Md. 1993) (applying Maryland law); Commercial Leasing,
Inc. v. Johnson, 160 Me. 32, 197 A.2d 323 (1964).
- 6 Reader's Digest Ass'n v. Mahin, 44 Ill. 2d 354, 255 N.E.2d 458 (1970).
- 7 Union Oil Co. of Cal. v. State Bd. of Equalization, 60 Cal. 2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 (1963).
- 8 Walgreens Specialty Pharmacy, LLC v. Commissioner of Revenue, 916 N.W.2d 529 (Minn. 2018).
As to the nexus requirement in an interstate commerce challenge to the application of a use tax, generally,
see § 156.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 151

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

a. In General

§ 151. Effect of privileges and immunities of citizens on use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

The Privileges and Immunities Clause of the United States Constitution¹ is not violated by a statute which imposes a tax upon the storage, use, or other consumption within the state of tangible personal property purchased for such purpose during a designated period, although such statute exempts from the tax articles upon which the state sales tax has been paid and makes no similar exemption with respect to articles upon which sales or use taxes have been paid in other states.²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

¹ U.S. Const. Amend. XIV.

² *State v. Fields*, 27 Ohio L. Abs. 662, 35 N.E.2d 744 (Ct. App. 2d Dist. Darke County 1938).

As to the Privileges and Immunities Clause, generally, see [Am. Jur. 2d, Constitutional Law § 790](#).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 152

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

a. In General

§ 152. Effect of equal protection on use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:10 \(2d ed.\)](#) (Motor vehicle use tax discrimination based on residency of purchaser of motor vehicle)

The constitutionality of particular use taxes frequently has been challenged upon the ground that they discriminate against certain classes of persons, thereby denying them equal protection of the law in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.¹ However, the courts have been very reluctant to invalidate a use tax on equal protection grounds.² To withstand an equal protection challenge, the classification drawn in a use-tax statute must be rational, reasonable, and nonarbitrary and rest on some ground of difference having a fair and substantial relation to the object of the use tax.³

Observation:

Courts also look to whether the difference in treatment between two groups furthers a legitimate state interest or purpose.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [General Motors Corp. v. Tracy](#), 519 U.S. 278, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997); [Hospitality Temps Corp. v. District of Columbia](#), 926 A.2d 131 (D.C. 2007); [Cox Cable Hampton Roads, Inc. v. City of Norfolk](#), 247 Va. 64, 439 S.E.2d 366 (1994).
As to the Equal Protection Clause of the United States Constitution, see [Am. Jur. 2d, Constitutional Law §§ 823 to 941](#).
As to the effect of the Equal Protection Clause on state and local taxation, generally, see [Am. Jur. 2d, State and Local Taxation § 101](#).
- 2 [Williams v. Vermont](#), 472 U.S. 14, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985); [Hepler v. Director, Div. of Taxation](#), 15 N.J. Tax 261, 1995 WL 795605 (1995), *aff'd*, 16 N.J. Tax 56, 1996 WL 636059 (Super. Ct. App. Div. 1996); [Cox Cable Hampton Roads, Inc. v. City of Norfolk](#), 247 Va. 64, 439 S.E.2d 366 (1994).
- 3 [Kellogg Co. v. Department of Treasury](#), 204 Mich. App. 489, 516 N.W.2d 108 (1994); [Datascope Corp. v. Tax Appeals Tribunal of State of N.Y.](#), 196 A.D.2d 35, 608 N.Y.S.2d 562 (3d Dep't 1994); [Cox Cable Hampton Roads, Inc. v. City of Norfolk](#), 247 Va. 64, 439 S.E.2d 366 (1994).
A state use tax statute, which established a classification between in-state and out-of-state sellers, bore a rational relationship to the legitimate state interest of leveling the economic playing field to local businesses subject to the interstate general excise tax (GET), and thus, the classification was not arbitrary or irrational, and did not violate the Equal Protection Clause. [CompUSA Stores, L.P. v. State Department of Taxation](#), 142 Haw. 304, 418 P.3d 645 (2018).
- 4 [Williams v. Vermont](#), 472 U.S. 14, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985); [PICA Corp., Inc. v. Tracy](#), 97 Ohio App. 3d 42, 646 N.E.2d 206 (10th Dist. Franklin County 1994).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 153

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

a. In General

§ 153. Effect of equal protection on use tax—Particular applications

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:10 \(2d ed.\)](#) (Motor vehicle use tax discrimination based on residency of purchaser of motor vehicle)

A use-tax statute does not violate the Equal Protection Clause by exempting from its application—

— contractors as opposed to speculative builders.¹

— newspapers but not magazines.²

— newspapers sold at retail but not shopping papers given away for free.³

— newspapers but not electronic data retrieval services.⁴

— advertisers who buy newspaper space but not advertisers who buy inserts from printers for use in newspapers.⁵

— local but not foreign distributors of natural gas.⁶

— new cars held by dealers and used for demonstration purposes but not a medical equipment manufacturer's demonstration equipment.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Tony P. Sellitti Const. Co. v. Caryl, 185 W. Va. 584, 408 S.E.2d 336 (1991).
- 2 Hearst Corp. v. Iowa Dept. of Revenue and Finance, 461 N.W.2d 295 (Iowa 1990); Magazine Publishers of America v. Com., Dept. of Revenue, 539 Pa. 563, 654 A.2d 519 (1995).
As to constitutionality of taxation of newspapers, generally, see Am. Jur. 2d, Newspapers, Periodicals and Press Associations §§ 30 to 33.
- 3 Stahlbrodt v. Commissioner of Taxation and Finance of the State of N.Y., 171 Misc. 2d 571, 654 N.Y.S.2d 938 (Sup 1996), judgment aff'd, 246 A.D.2d 793, 666 N.Y.S.2d 526 (3d Dep't 1998), aff'd as modified on other grounds, 92 N.Y.2d 646, 684 N.Y.S.2d 466, 707 N.E.2d 421 (1998).
- 4 Reuters America, Inc. v. Sharp, 889 S.W.2d 646 (Tex. App. Austin 1994), writ denied, (Sept. 14, 1995).
- 5 Walgreen Co. v. Charnes, 911 P.2d 667 (Colo. App. 1995), as modified on denial of reh'g, (Sept. 7, 1995).
- 6 General Motors Corp. v. Tracy, 519 U.S. 278, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997).
- 7 Datascope Corp. v. Tax Appeals Tribunal of State of N.Y., 196 A.D.2d 35, 608 N.Y.S.2d 562 (3d Dep't 1994).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 154

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

a. In General

§ 154. Effect of Supremacy Clause on use tax; taxation of United States and its agencies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3621, 3626 to 3633

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 6:15 \(2d ed.\)](#) (Sharp constriction of federal freedom from state and local taxation)

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:9 \(2d ed.\)](#) (Impact of federal tax immunity)

A state may not, consistent with the Supremacy Clause of the United States Constitution,¹ lay a use tax directly on the United States² or on its closely connected agent or instrumentality.³

The government's right to be free from state use taxation does not spell immunity from paying the added costs attributable to the imposition of a use tax on those who furnish supplies to the government and who have been granted no tax immunity.⁴

Observation:

There is no constitutional impediment to the imposition of a use tax on a liquidation sale held by a trustee in bankruptcy, as a bankruptcy trustee is not so closely connected to the federal government that the two cannot realistically be viewed as separate entities.⁵

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 U.S. Const. Art. VI, cl. 2.
- 2 U.S. v. Hawkins County, Tenn., 859 F.2d 20 (6th Cir. 1988).
As to the Supremacy Clause, generally, see Am. Jur. 2d, Constitutional Law §§ 53 to 59.
- 3 U. S. v. New Mexico, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982); Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 (Ky. 1998).
- 4 U. S. v. New Mexico, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).
As to the imposition of use taxes on government contractors, generally, see § 198.
- 5 California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 109 S. Ct. 2228, 104 L. Ed. 2d 910 (1989).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 155

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

b. Effect of Commerce Clause on Use Tax

§ 155. Effect of Commerce Clause on use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3609](#), [3621](#), [3626](#) to [3633](#)

A.L.R. Library

[Validity, Construction, and Application of Sales, Use, and Utility Taxes on Retail Transactions of Internet Sellers and Internet Access Providers](#), 30 A.L.R.6th 341

[Sufficient nexus for state to require foreign entity to collect state's compensating, sales, or use tax—post-Complete Auto Transit cases](#), 71 A.L.R.5th 671

[Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, s8, cl. 3—Supreme Court Cases](#), 41 A.L.R. Fed. 2d 1

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:7 \(2d ed.\)](#) (Compensating use tax and discrimination)

Forms

[Am. Jur. Pleading and Practice Forms, Sales and Use Taxes § 25](#) (Answer—Defense—Use tax as undue burden on interstate commerce)

The Commerce Clause of the United States Constitution provides that Congress will have the power to regulate commerce with foreign nations, and among the several states, and with Indian tribes.¹ The affirmative constitutional grant of power to Congress to regulate commerce among the state contains a negative command that states cannot discriminate against or unduly burden interstate commerce.² The assessment of a use tax is frequently challenged on the ground that it violates the Commerce Clause.³

To evaluate the validity of a use tax vis-à-vis the Commerce Clause, the Supreme Court has provided a four-part test under which a tax will be found constitutional if:⁴

- (1) the activity to be taxed is sufficiently connected to the state to justify the tax;⁵
- (2) the tax is fairly apportioned;⁶
- (3) the tax does not discriminate against interstate commerce;⁷ and
- (4) the tax is fairly related to benefits provided the taxpayer.⁸

Caution:

The failure to meet any one prong of the test renders a use tax invalid.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Am. Jur. 2d, Commerce § 1.](#)
- ² [CompUSA Stores, L.P. v. State Department of Taxation](#), 142 Haw. 304, 418 P.3d 645 (2018); [Walgreens Specialty Pharmacy, LLC v. Commissioner of Revenue](#), 916 N.W.2d 529 (Minn. 2018).
- ³ [D.H. Holmes Co. Ltd. v. McNamara](#), 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); [Worldcorp v. State, Dept. of Taxation](#), 113 Nev. 1032, 944 P.2d 824 (1997); [Lady Frances, LLC v. Director, Div. of Taxation](#), 24 N.J. Tax 545, 2009 WL 1174979 (2009); [Internatl. Thomson Publishing, Inc. v. Tracy](#), 79 Ohio St. 3d 415, 1997-Ohio-138, 683 N.E.2d 1091 (1997).

As to the effect of the Commerce Clause on state and local taxation, generally, see [Am. Jur. 2d, State and Local Taxation §§ 157 to 169](#).

4 [Complete Auto Transit, Inc. v. Brady](#), 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977); [Regency Transp., Inc. v. Commissioner of Revenue](#), 473 Mass. 459, 42 N.E.3d 1133 (2016); [Walgreens Specialty Pharmacy, LLC v. Commissioner of Revenue](#), 916 N.W.2d 529 (Minn. 2018); [Commercial Barge Line Co. v. Director of Revenue](#), 431 S.W.3d 479 (Mo. 2014); [Matkovich v. CSX Transportation, Inc.](#), 238 W. Va. 238, 793 S.E.2d 888 (2016).

5 § 156.

6 § 157.

7 § 158.

8 § 159.

9 [Tennessee Gas Pipeline Co. v. Marx](#), 594 So. 2d 615 (Miss. 1992).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 156

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

b. Effect of Commerce Clause on Use Tax

§ 156. Nexus between state and use of property being taxed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3609](#), [3621](#), [3626](#) to [3633](#)

A.L.R. Library

[Validity, Construction, and Application of Sales, Use, and Utility Taxes on Retail Transactions of Internet Sellers and Internet Access Providers](#), 30 A.L.R.6th 341

[Sufficient nexus for state to require foreign entity to collect state's compensating, sales, or use tax—post-Complete Auto Transit cases](#), 71 A.L.R.5th 671

For a use tax to meet the first prong of the test for constitutionality under the Commerce Clause, that is, the requirement that the state have a sufficient nexus with the use of the property being taxed,¹ the taxpayer must substantially avail itself of the privilege of doing business in the taxing state.² Nexus may be established by substantial economic and virtual contacts, as well as by physical presence. An out-of-state seller's physical presence in the taxing state is no longer necessary to establish nexus for the state to require the seller to collect and remit its sales tax.³

Observation:

The required nexus can be either between the use sought to be taxed and the state or between the person or entity that the state is seeking to tax and the state.⁴

The requisite nexus to impose a use tax generally has been found when the out-of-state retailer arranges for local representatives to make sales within the taxing state,⁵ although under some authority, in order for a sufficient nexus to exist for purposes of imposing a use tax, the local representatives must be employees or agents of the out-of-state company, able to bind the company, and under the company's control.⁶ However, when the foreign retailer has no direct personal contacts in the taxing state or does its business only by mail, the requisite nexus usually does not exist.⁷ This nexus requirement and analysis has been applied to Internet sellers as well as traditional retailers to determine if the imposition of use taxes is constitutional under the Commerce Clause.⁸

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 § 155.
- 2 [Current, Inc. v. State Bd. of Equalization](#), 24 Cal. App. 4th 382, 29 Cal. Rptr. 2d 407 (1st Dist. 1994); [Saudi Refining, Inc. v. Director of Revenue](#), 715 A.2d 89 (Del. Super. Ct. 1998); [Insinger Mach. Co. v. Philadelphia Tax Review Bd. \(TRB\)](#), 165 Pa. Commw. 344, 645 A.2d 365 (1994).
- 3 § 22.
- 4 [Saudi Refining, Inc. v. Director of Revenue](#), 715 A.2d 89 (Del. Super. Ct. 1998); [AT&T Communications of Maryland, Inc. v. Comptroller of Treasury](#), 405 Md. 83, 950 A.2d 86 (2008).
The imposition of a use tax on a corporate yacht that was docked in New Jersey for 69 days and 46 days did not violate the Commerce Clause; a sufficient nexus existed to justify taxation by New Jersey since the yacht was docked in New Jersey, and the tax did not discriminate against interstate commerce because it was imposed uniformly on residents and nonresidents and property in intrastate and interstate commerce. [Lady Frances, LLC v. Director, Div. of Taxation](#), 24 N.J. Tax 545, 2009 WL 1174979 (2009).
- 5 [Florida Dept. of Revenue v. Share Intern., Inc.](#), 667 So. 2d 226 (Fla. 1st DCA 1995), decision approved, 676 So. 2d 1362 (Fla. 1996); [Gillette Co. v. Department of Treasury](#), 198 Mich. App. 303, 497 N.W.2d 595 (1993).
A substantial nexus existed under the commerce clause between an out-of-state book retailer and state teachers to justify the imposition of sales or use taxes on the retailer for book sales because the teachers were the retailer's representatives, even though there was no agreement compelling the teachers to serve as agents or sellers of the retailer's products and the teachers received no direct compensation from the retailer. By taking the students' book orders, delivering the ordered books, and resolving all complaints and problems arising following the delivery of the retailers' books, the teachers served as the only means through which retailer communicated with students. [Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services](#), 304 Conn. 204, 38 A.3d 1183 (2012).
- 6 [Pledger v. Troll Book Clubs, Inc.](#), 316 Ark. 195, 871 S.W.2d 389 (1994); [Scholastic Book Clubs, Inc. v. State, Dept. of Treasury, Revenue Div.](#), 223 Mich. App. 576, 567 N.W.2d 692 (1997).

- 7 Current, Inc. v. State Bd. of Equalization, 24 Cal. App. 4th 382, 29 Cal. Rptr. 2d 407 (1st Dist. 1994);
Department of Revenue v. Share Intern., Inc., 676 So. 2d 1362 (Fla. 1996).
- 8 Borders Online v. State Bd. of Equalization, 129 Cal. App. 4th 1179, 29 Cal. Rptr. 3d 176 (1st Dist. 2005).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 157

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

b. Effect of Commerce Clause on Use Tax

§ 157. Fair apportionment of use tax; requirement of internal and external consistency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

The second prong of the test of the constitutionality of a use tax under the Commerce Clause, that is, the requirement that the state fairly apportion the use tax,¹ means that the use tax must not be duplicative or subject an already taxed activity or incident to double taxation.²

Observation:

The apportionment requirement prevents a state from imposing a use tax on more than its fair share of an interstate transaction.³

Under the Commerce Clause, there is no set formula for determining whether a tax is fairly apportioned.⁴ To be fairly apportioned, a use tax must be internally and externally consistent.⁵ To be internally consistent, a use tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result.⁶ Whether a tax is fairly apportioned or discriminates against interstate commerce can be determined by application of the internal consistency test. Under the internal

consistency test, if all states imposed the same tax with the result that interstate commerce is placed at a disadvantage over intrastate commerce, a tax is not internally consistent and is unconstitutional under the Commerce Clause.⁷ To be externally consistent, it must be imposed only on that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the use being taxed.⁸ To determine whether a tax is externally consistent, the court examines the in-state business activity which triggers the taxable event and the practical or economic effect on that interstate activity.⁹ The provision of a credit in the use-tax statute for sales or use tax paid to another state makes a use tax externally consistent, as such a provision avoids actual multiple taxation.¹⁰

Practice Tip:

The party opposing the use tax must show by clear and convincing evidence that the tax is out of proportion to the activity which takes place in the taxing state.¹¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 § 155.
- 2 Polychrome Intern. Corp. v. Krigger, 29 V.I. 311, 5 F.3d 1522 (3d Cir. 1993); Saudi Refining, Inc. v. Director of Revenue, 715 A.2d 89 (Del. Super. Ct. 1998); Matter of Hawaiian Flour Mills, Inc., 76 Haw. 1, 868 P.2d 419 (1994); Kellogg Co. v. Department of Treasury, 204 Mich. App. 489, 516 N.W.2d 108 (1994).
As to double or multiple taxation, generally, see §§ 148, 149.
- 3 Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 42 N.E.3d 1133 (2016); Matkovich v. CSX Transportation, Inc., 238 W. Va. 238, 793 S.E.2d 888 (2016).
- 4 Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 5 LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846 (Iowa 2015); Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 6 Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 42 N.E.3d 1133 (2016); Commonwealth Brands, Inc. v. Morgan, 110 So. 3d 752 (Miss. 2013).
Use tax statute was complementary and internally consistent, and thus, under the internal consistency test, was not in violation of the Commerce Clause; the statute guarded against multiple taxation by mandating exemptions or deductions where multiple taxation would arise. *CompUSA Stores, L.P. v. State Department of Taxation*, 142 Haw. 304, 418 P.3d 645 (2018).
- 7 *CompUSA Stores, L.P. v. State Department of Taxation*, 142 Haw. 304, 418 P.3d 645 (2018); *Walgreens Specialty Pharmacy, LLC v. Commissioner of Revenue*, 916 N.W.2d 529 (Minn. 2018).
- 8 D.H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); *Gannett Co., Inc. v. State Tax Assessor*, 2008 ME 171, 959 A.2d 741 (Me. 2008); *Regency Transp., Inc. v. Commissioner of Revenue*, 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 9 *Regency Transp., Inc. v. Commissioner of Revenue*, 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 10 D.H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); *Internatl. Thomson Publishing, Inc. v. Tracy*, 79 Ohio St. 3d 415, 1997-Ohio-138, 683 N.E.2d 1091 (1997); *Matkovich v. CSX Transportation, Inc.*, 238 W. Va. 238, 793 S.E.2d 888 (2016).

11 [Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 \(Miss. 1992\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 158

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

b. Effect of Commerce Clause on Use Tax

§ 158. Discrimination against interstate or foreign commerce in imposition of use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

The third prong of the test of the constitutionality of a use tax under the Commerce Clause, that is, the requirement that the use tax not discriminate against interstate commerce,¹ forbids a state from imposing a heavier use-tax burden on out-of-state businesses engaging in interstate commerce than that imposed on its own residents.² Essentially the discrimination criterion requires equal treatment of interstate and local commerce.³

In determining whether the negative or dormant aspect of the Commerce Clause is violated by a statute, the first step is to determine whether it discriminates on its face against interstate commerce. Discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.⁴ Discriminatory laws motivated by simple economic protectionism are subject to a virtually per se rule of invalidity, which can only be overcome by a showing that the state has no other means to advance a legitimate local purpose.⁵ When the purpose of a use tax affecting interstate commerce amounts to simple economic protectionism, a virtual per se rule of invalidity is applied.⁶ If a tax law is discriminatory on its face, it will nevertheless comport with the Commerce Clause, if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.⁷ One such legitimate local purpose is to ensure that those engaged in interstate commerce contribute their just share of state tax burdens by imposing a tax that complements an existing tax on intrastate commerce.⁸ A tax structure that imposes a use tax to compensate the state for revenue lost when residents purchase out-of-state goods for use within the state when such use tax is equal to the sales tax applicable to the same tangible personal property purchased within the state generally is nondiscriminatory.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 § 155.
- 2 Associated Industries of Missouri v. Lohman, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994); Barringer v. Griffes, 1 F.3d 1331 (2d Cir. 1993); Saudi Refining, Inc. v. Director of Revenue, 715 A.2d 89 (Del. Super. Ct. 1998); Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996).
As to double or multiple taxation, generally, see §§ 148, 149.
- 3 Matkovich v. CSX Transportation, Inc., 238 W. Va. 238, 793 S.E.2d 888 (2016).
- 4 CompUSA Stores, L.P. v. State Department of Taxation, 142 Haw. 304, 418 P.3d 645 (2018).
- 5 CompUSA Stores, L.P. v. State Department of Taxation, 142 Haw. 304, 418 P.3d 645 (2018).
- 6 Russell Stewart Oil Co. v. State, 124 Ill. 2d 116, 124 Ill. Dec. 503, 529 N.E.2d 484 (1988); Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).
- 7 CompUSA Stores, L.P. v. State Department of Taxation, 142 Haw. 304, 418 P.3d 645 (2018); Russell Stewart Oil Co. v. State, 124 Ill. 2d 116, 124 Ill. Dec. 503, 529 N.E.2d 484 (1988).
- 8 CompUSA Stores, L.P. v. State Department of Taxation, 142 Haw. 304, 418 P.3d 645 (2018).
- 9 D.H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Quotron Systems, Inc. v. Limbach, 62 Ohio St. 3d 447, 584 N.E.2d 658 (1992).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 159

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

b. Effect of Commerce Clause on Use Tax

§ 159. Relation of use tax to benefits

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

The fourth prong of the test for the constitutionality of a use tax under the Commerce Clause, that is, the requirement that the tax be fairly related to the benefits provided by the state,¹ is premised on whether the state has given anything for which it can ask in return and is closely allied with the nexus inquiry.² The fair relation prong of a Commerce Clause analysis requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a state limited to offsetting the public costs created by the taxed activity. Rather, the criterion asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the state.³

Under the Commerce Clause, a tax need not relate directly to the interstate activity at use; rather, the strictures of the Commerce Clause are satisfied where the taxpayer received police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society.⁴ The out-of-state payer of a use tax may be required to contribute not only to the cost of the services performed by the state on account of the particular use which forms the basis for the tax but also for all governmental services, including those from which the taxpayer arguably receives no direct benefit.⁵ Thus, for instance, there is a fair relation between a use tax and the services provided by a state when an aircraft is housed and maintained at an in-state airport, inasmuch as this in-state housing facilitates the use of the aircraft, which in turn facilitates the owner's business activities both in and out of state.⁶ Similarly, a use tax is fairly related to state-provided services when the taxpayer receives fire and police protection for its equipment, makes use of public roads to benefit its employees,⁷ and avails itself of the use of the state's court system.⁸

Footnotes

- 1 § 155.
- 2 Saudi Refining, Inc. v. Director of Revenue, 715 A.2d 89 (Del. Super. Ct. 1998); Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Columbia Gulf Transmission Co. v. Broussard, 653 So. 2d 522 (La. 1995); Insinger Mach. Co. v. Philadelphia Tax Review Bd. (TRB), 165 Pa. Commw. 344, 645 A.2d 365 (1994).
 As to the nexus requirement in this regard, generally, see § 156.
- 3 Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 4 Regency Transp., Inc. v. Commissioner of Revenue, 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 5 Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).
- 6 H.K. Porter Co., Inc. v. Com., 111 Pa. Commw. 463, 534 A.2d 169 (1987).
- 7 D.H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Quotron Systems, Inc. v. Limbach, 62 Ohio St. 3d 447, 584 N.E.2d 658 (1992).
 A motor vehicle tax imposed on an interstate carrier was fairly related to the services provided by the commonwealth even though the tax was not apportioned based on miles traveled in the commonwealth, where the carrier used and stored its trucking fleet in the commonwealth. [Regency Transp., Inc. v. Commissioner of Revenue](#), 473 Mass. 459, 42 N.E.3d 1133 (2016).
- 8 Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 160

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

c. Effect of First Amendment on Use Tax

§ 160. Effect of freedom of press and speech on use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

The First Amendment guarantee of freedom of the press does not prevent a state from imposing a use tax on the press in the same manner that it imposes use taxes on other enterprises.¹ In addition, First Amendment principles do not require that a state impose a use tax on all mass media in the same way.²

A legislature may subsidize one form of publication, for example, newspapers, by granting it an exemption from a generally applicable use tax but is not required by the First Amendment to also exempt other forms of publications as long as there is a rational noncontent basis for the distinction.³ However, a regulatory definition of a newspaper as a publication which disseminates information which is "important" and of "current interest to the general public" and which renders publications that fall under this definition subject to an exemption from a sales and use tax is a content-based distinction which requires heightened scrutiny under the First Amendment.⁴

In the absence of proof concerning the size or impact on other parties denied an exemption to a sales and use tax, the tax does not facially violate a printing firm's constitutional right to freedom of the press when the printing firm is denied the exemption.⁵ However, a use tax that differentiates between media sources of the same type will not pass muster under the First Amendment unless a compelling justification for the differential treatment exists.⁶ For example, an exemption from the use tax for "Holy Bibles" differentiates between a Christian sacred text and other publications, both sacred and nonsacred and Christian and non-Christian, and thus forces the state to discriminate on the basis of the contents of a book, text, or other published work which is intolerable under the First Amendment.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue](#), 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983).
As to freedom of speech and the press under the United States Constitution, generally, see [Am. Jur. 2d, Constitutional Law §§ 465 to 553](#).
As to constitutionality of taxation of newspapers, generally, see [Am. Jur. 2d, Newspapers, Periodicals and Press Associations §§ 30 to 33](#).
- 2 [Hearst Corp. v. Iowa Dept. of Revenue and Finance](#), 461 N.W.2d 295 (Iowa 1990).
- 3 [Hearst Corp. v. Iowa Dept. of Revenue and Finance](#), 461 N.W.2d 295 (Iowa 1990); [Magazine Publishers of America v. Com., Dept. of Revenue](#), 539 Pa. 563, 654 A.2d 519 (1995); [Reuters America, Inc. v. Sharp](#), 889 S.W.2d 646 (Tex. App. Austin 1994), writ denied, (Sept. 14, 1995).
- 4 [Emmis Pub. Corp. v. Indiana Dept. of State Revenue](#), 612 N.E.2d 614 (Ind. Tax Ct. 1993).
- 5 [R.R. Donnelley & Sons Co. v. Fuchs](#), 670 So. 2d 113 (Fla. 1st DCA 1996).
- 6 [Hearst Corp. v. Iowa Dept. of Revenue and Finance](#), 461 N.W.2d 295 (Iowa 1990).
As to the application of the strict scrutiny test, generally, see [Am. Jur. 2d, Constitutional Law § 403](#).
- 7 [Finlator v. Powers](#), 902 F.2d 1158 (4th Cir. 1990).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 161

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

c. Effect of First Amendment on Use Tax

§ 161. Effect of freedom of press and speech on use tax—Commercial speech

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

Since commercial advertising is not entitled to the same protection as other forms of speech,¹ a use-tax exemption for newspapers and periodicals which expressly excludes shopping guides or any other publication a certain percentage or more of which is devoted to advertising is not a violation of the First Amendment rights of the advertisers.² Similarly, a generally applicable use tax that fails to exempt advertising services is not directly and discriminatorily aimed at the exercise of the right to free speech, nor does it target the press or discriminate on the basis of the content of speech involved and so does not violate the freedom of speech, press, or association of advertisers or of media in which the advertising is carried.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Am. Jur. 2d, Constitutional Law § 499.](#)
- ² [Redwood Empire Publishing Co. v. State Bd. of Equalization](#), 207 Cal. App. 3d 1334, 255 Cal. Rptr. 514 (1st Dist. 1989).
As to the constitutionality of taxation of newspapers, generally, see [Am. Jur. 2d, Newspapers, Periodicals and Press Associations §§ 30 to 33.](#)
- ³ [In re Advisory Opinion to the Governor](#), 509 So. 2d 292 (Fla. 1987).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 162

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

B. Constitutionality of Statute Imposing Use Tax

2. Particular Constitutional Grounds Affecting Use Tax

c. Effect of First Amendment on Use Tax

§ 162. Effect of free exercise or establishment of religion on use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3621](#), [3626](#) to [3633](#)

Although it is possible to imagine that a use-tax rate could be so onerous as to choke off an adherent's religious practices, in most circumstances, a generally applicable use tax does not interfere with a religious organization's right under the First Amendment to be free from laws that prohibit the free exercise of religion.¹

The assessment and collection of a use tax on a religious organization's use of tangible personal property sold at retail imposes no constitutionally significant burden on religious practices or beliefs and thus does not require a state to grant to religious organizations an exemption from the use tax when: (1) the use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in the state; (2) the tax is not imposed as a precondition of disseminating a religious message; and (3) there is no evidence that collection and payment of the tax violates the organization's religious beliefs.² To the extent that the imposition of a generally applicable use tax merely decreases the amount of money a religious organization has to spend on its religious activities, any such burden is not constitutionally significant.³

A generally applicable use tax on a religious organization's use of tangible personal property having a secular purpose that neither advances nor inhibits religion threatens no excessive entanglement between church and state⁴ and thus does not violate the First Amendment prohibition against laws respecting the establishment of religion.⁵ On the other hand, a use tax that exempts periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and for books that consist wholly of writings sacred to a religious faith violates the Establishment Clause.⁶ Accordingly, a use tax exemption for "Holy Bibles" violates the Establishment Clause.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990); Haller v. Com., 693 A.2d 266 (Pa. Commw. Ct. 1997), *aff'd*, 556 Pa. 289, 728 A.2d 351 (1999).
As to the Free Exercise Clause of the United States Constitution, generally, see Am. Jur. 2d, Constitutional Law §§ 443 to 447.
- 2 Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990).
- 3 Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990); State v. McBride, 24 Kan. App. 2d 909, 955 P.2d 133 (1998).
- 4 Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990).
- 5 Am. Jur. 2d, Constitutional Law § 436.
- 6 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989); Haller v. Com., 693 A.2d 266 (Pa. Commw. Ct. 1997), *aff'd*, 556 Pa. 289, 728 A.2d 351 (1999).
- 7 Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990); Haller v. Com., 693 A.2d 266 (Pa. Commw. Ct. 1997), *aff'd*, 556 Pa. 289, 728 A.2d 351 (1999).
As to the exemption of Bibles as a violation of the First Amendment, see § 160.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes II C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

C. Construction of Statutes Relating to Use Tax

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3623](#), [3624](#), [3626](#), [3630](#), [3635](#), [3638](#), [3692](#)

A.L.R. Library

A.L.R. Index, Sales and Use Taxes

West's A.L.R. Digest, [Taxation](#)  [3623](#), [3624](#), [3626](#), [3630](#), [3635](#), [3638](#), [3692](#)

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 163

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

C. Construction of Statutes Relating to Use Tax

§ 163. Construction of statutes relating to use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3623](#), [3624](#), [3626](#), [3638](#), [3692](#)

A.L.R. Library

[Items or Materials Exempt From Use Tax as Becoming Component Part or Ingredient of Manufactured or Processed Article, 89 A.L.R.5th 493](#)

Use tax statutes are analyzed under the general rules of statutory interpretation.¹ To determine whether a transaction gives rise to a use-tax liability, the court objectively examines the essence and substance of the transaction.² The real object of a transaction involving both the sale of an article and the rendering of services must be applied to the totality of the transaction in determining the portion of the transaction subject to the use taxation.³ The economic reality of a transaction should be considered regardless of the form of the transaction when it is necessary to avoid the creation of a loophole in the tax law.⁴

There are statutes to the effect that every use of tangible personal property is presumed to be taxable.⁵ Exemptions from the use taxation are strictly construed,⁶ and when claiming an exemption, a taxpayer must affirmatively establish its right thereto.⁷ Taxpayers' exemption claims must be supported by adequate records, and the burden of proof is on the taxpayer.⁸ When the issue is the imposition of a use tax rather than a claimed right to an exemption or deduction, however, the governing authorities must be strictly construed against the state and in favor of the taxpayer.⁹

Observation:

The courts may not read into a use tax exemptions that do not clearly appear.¹⁰ Instead, an exemption from tax must be clearly and unambiguously expressed in the statute.¹¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Auto-Owners Ins. Co. v. Department of Treasury, 313 Mich. App. 56, 880 N.W.2d 337 (2015).
As to the interpretation of statutes, generally, see Am. Jur. 2d, Statutes §§ 58 to 230.
- 2 Maurer v. Indiana Dept. of State Revenue, 607 N.E.2d 985 (Ind. Tax Ct. 1993); Questar Data Systems, Inc. v. Commissioner of Revenue, 549 N.W.2d 925 (Minn. 1996).
- 3 Mr. B's, Inc. v. City of Chicago, 302 Ill. App. 3d 930, 236 Ill. Dec. 127, 706 N.E.2d 1001 (1st Dist. 1998); New England Tel. & Tel. Co. v. Clark, 624 A.2d 298 (R.I. 1993).
- 4 Ianniello v. New York Tax Appeals Tribunal, 209 A.D.2d 740, 617 N.Y.S.2d 973 (3d Dep't 1994).
- 5 § 140.
- 6 Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue, 242 Ariz. 85, 393 P.3d 146 (Ct. App. Div. 1 2017); Commonwealth v. Interstate Gas Supply, Inc. for Use and Benefit of Tri-State Healthcare Laundry, Inc., 554 S.W.3d 831 (Ky. 2018); Interventional Center for Pain Management v. Director of Revenue, 592 S.W.3d 350 (Mo. 2019); Carsforsale.com, Inc. v. South Dakota Department of Revenue, 2019 SD 4, 922 N.W.2d 276 (S.D. 2019).
- 7 Brunt Associates, Inc. v. Dep't of Treasury, 318 Mich. App. 449, 898 N.W.2d 256 (2017); Ben Hur Steel Worx, LLC v. Director of Revenue, 452 S.W.3d 624 (Mo. 2015).
A tax exemption is allowed only upon clear and unequivocal proof, any doubts are resolved against the party claiming it, and the burden is on the taxpayer seeking the exemption to show that the transaction at issue fits the statutory language exactly. Bartlett International, Inc. v. Director of Revenue, 487 S.W.3d 470 (Mo. 2016).
As to the construction of exemptions to state and local taxes, generally, see Am. Jur. 2d, State and Local Taxation § 229.
- 8 Loeffler v. Target Corp., 58 Cal. 4th 1081, 171 Cal. Rptr. 3d 189, 324 P.3d 50 (2014).
- 9 Tax Appeal of Director of Taxation v. Medical Underwriters of California, 115 Haw. 180, 166 P.3d 353 (2007); Shakman v. Department of Revenue, 2019 IL App (1st) 182197, 2019 WL 6827591 (Ill. App. Ct. 1st Dist. 2019), appeal denied, 437 Ill. Dec. 613, 144 N.E.3d 1203 (Ill. 2020); Interventional Center for Pain Management v. Director of Revenue, 592 S.W.3d 350 (Mo. 2019).
- 10 GTE Automatic Elec. v. Director of Revenue, State of Mo., 780 S.W.2d 49 (Mo. 1989) (overruled on other grounds by, Southwestern Bell Tel. Co. v. Director of Revenue, 78 S.W.3d 763 (Mo. 2002)).
- 11 Public Service Co. of N.M. v. N.M. Taxation & Revenue Dept., 141 N.M. 520, 2007-NMCA-050, 157 P.3d 85 (Ct. App. 2007).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 164

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.


II. Use Taxes

C. Construction of Statutes Relating to Use Tax

§ 164. Presumption against intent of double taxation in construction of use tax statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3630, 3692

In the construction of use-tax statutes, double taxation should be avoided wherever possible.¹ There is a strong presumption against double taxation, therefore, and the statutes will be construed so as to permit it only when the legislative intent to do so is clear.²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [J. Ray McDermott, Inc. v. Morrison](#), 705 So. 2d 195 (La. Ct. App. 1st Cir. 1997), writ denied, 709 So. 2d 753 (La. 1998) and writ denied, 709 So. 2d 754 (La. 1998).
As to exemptions from state and local taxes in order to avoid double taxation, generally, see [Am. Jur. 2d, State and Local Taxation § 217](#).
- 2 As to the constitutional issues raised by double taxation, see §§ [148](#), [149](#).
[Fraternal Order of Police v. South Carolina Dept. of Revenue](#), 332 S.C. 496, 506 S.E.2d 495 (1998).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 165

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

C. Construction of Statutes Relating to Use Tax

§ 165. Construction of use tax statutes as whole; effect given every part; construction with sales tax law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3623](#), [3624](#), [3626](#), [3638](#)

The construction of use-tax statutes are subject to the general rules of statutory interpretation.¹ The intention of the legislature in enacting a use-tax statute must be sought by an examination and consideration of the entire act and all of its parts and not from any particular word or phrase that may be contained in it.² The presumption is that the legislature intends an act to be effective as an entirety, and significance and effect will, if possible, be accorded to every part of the act.³ As to any particular word or phrase, in the absence of compelling evidence to the contrary, the courts will not presume that the legislature has intended to depart substantially from the accepted meaning of that word or phrase.⁴

The use-tax law is construed in light of its purpose to supplement or complement the sales tax law⁵ and in pari materia with such law.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ § 163.
As to the interpretation of statutes, generally, see [Am. Jur. 2d, Statutes §§ 58 to 230](#).
- ² [USAir, Inc. v. Indiana Dept. of State Revenue](#), 623 N.E.2d 466 (Ind. Tax Ct. 1993); [Hanbro, Inc. v. Johnson](#), 158 Me. 180, 181 A.2d 249 (1962); [Atlantic Gulf & Pac. Co. v. Gerosa](#), 16 N.Y.2d 1, 261 N.Y.S.2d 32, 209 N.E.2d 86 (1965).
- ³ [J. A. Tobin Const. Co. v. Weed](#), 158 Colo. 430, 407 P.2d 350 (1965); [George v. Scent](#), 346 S.W.2d 784 (Ky. 1961).

- 4 Steelcase, Inc. v. Crystal, 238 Conn. 571, 680 A.2d 289 (1996); Miles, Inc. v. Indiana Dept. of State Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); Beare Co. v. Tennessee Dept. of Revenue, 858 S.W.2d 906 (Tenn. 1993).
- 5 § 136.
- 6 Associated Industries of Missouri v. Lohman, 511 U.S. 641, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994); State v. Toolen, 277 Ala. 120, 167 So. 2d 546 (1964); Union Oil Co. of Cal. v. State Bd. of Equalization, 60 Cal. 2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 (1963).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 166

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

C. Construction of Statutes Relating to Use Tax

§ 166. Effect of administrative construction of use tax statute

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3623](#), [3624](#), [3626](#), [3635](#)

The construction or interpretation of a use-tax statute by the agency charged with its enforcement, while not controlling upon the courts in determining the meaning and intent of the statute, is entitled to great weight,¹ especially when the administrative construction is contemporaneous with the enactment of the statute² or has continued for a long period of time.³ While the Division of Taxation's interpretation of a statute via a regulation is entitled to deference by a court, an article it publishes is not an authoritative pronouncement, nor does it have the binding effect of a statute or regulation.⁴

Some courts have conducted a de novo review to determine whether the applicability of a use tax in a particular situation is warranted, and a court can substitute its judgment for that of the taxing authority which has made a prior determination.⁵

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Allied Marine Group v. Department of Revenue](#), 701 So. 2d 630 (Fla. 4th DCA 1997); [Tetra Tech EC, Inc. v. Wisconsin Department of Revenue](#), 2017 WI App 4, 373 Wis. 2d 287, 890 N.W.2d 598 (Ct. App. 2016), decision aff'd, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 (2018).
The interpretation of tax statutes by the Director of the Division of Taxation is entitled to a presumption of validity; courts recognize the Director's expertise in the highly specialized and technical area of taxation. [Simon v. Director, Div. of Taxation](#), 24 N.J. Tax 509, 2009 WL 1174974 (2009).
As to the effect of agency constructions on the courts, generally, see [Am. Jur. 2d, Administrative Law](#) § 74.
- ² [Union Oil Co. of Cal. v. State Bd. of Equalization](#), 60 Cal. 2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 (1963); [U. S. Gypsum Co. v. Green](#), 110 So. 2d 409 (Fla. 1959).
- ³ [Haden v. McCarty](#), 275 Ala. 76, 152 So. 2d 141 (1963).

- 4 [Liscio's Italian Bakery, Inc. v. Director, Division of Taxation, 31 N.J. Tax 249, 2019 WL 4784811 \(2019\).](#)
- 5 [LaCrosse Queen, Inc. v. Wisconsin Dept. of Revenue, 208 Wis. 2d 439, 561 N.W.2d 686 \(1997\).](#)
- As to judicial review of a sales or use tax assessment, generally, see § 235.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes II D Refs.

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Taxation](#) 🔑 3609, 3636 to 3658

A.L.R. Library

A.L.R. Index, Components

A.L.R. Index, Manufacturers and Manufacturing

A.L.R. Index, Sales and Use Taxes

West's A.L.R. Digest, [Taxation](#) 🔑 3609, 3636 to 3658

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 167

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

1. In General

§ 167. Activities subject to use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3636 to 3658

In order to incur liability for a use tax, a taxpayer typically must either use, store, or otherwise consume some kind of tangible property or service.¹ Whether a particular activity is a "use," "storage," or "other consumption" subjecting a taxpayer to use-tax liability often is clarified by statute,² although the courts may be called upon to make such a determination.³ Whether a certain use subjects property to use taxes is a fact-driven analysis based on the totality of circumstances in a given case.⁴

Use-tax statutes often expressly exclude the use, storage, or consumption of certain kinds of property from their scope, either by limitations stated in the language setting forth the use tax's general application⁵ or by enumerated exemptions.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ § 135.
- ² §§ 141 to 143.
- ³ *Phillips Mercantile Co. v. New Mexico Taxation and Revenue Dept.*, 109 N.M. 487, 1990-NMCA-006, 786 P.2d 1221 (Ct. App. 1990).
- ⁴ *Eagle Rental, Inc. v. State Tax Assessor*, 2013 ME 48, 65 A.3d 1278 (Me. 2013).
- ⁵ *Sunshine Developers, Inc. v. Tax Com'n of State of N.Y.*, 132 A.D.2d 752, 517 N.Y.S.2d 317 (3d Dep't 1987); *Commonwealth, Dept. of Taxation v. Miller-Morton Co.*, 220 Va. 852, 263 S.E.2d 413 (1980).
- ⁶ § 168.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 168

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes


D. Transactions Subject to Use Tax

1. In General

§ 168. Exemptions or exclusions from use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3636 to 3658

A.L.R. Library

[Items or Materials Exempt From Use Tax as Becoming Component Part or Ingredient of Manufactured or Processed Article, 89 A.L.R.5th 493](#)

[Sales and use tax exemption for medical supplies, 30 A.L.R.5th 494](#)

[Mining exemption to sales or use tax, 47 A.L.R.4th 1229](#)

[Eyeglasses or other optical accessories as subject to sales or use tax, 14 A.L.R.4th 1370](#)

[Sales or use tax: deduction or exemption of discount or premium in computing amount of sales, 90 A.L.R.2d 338](#)

Use-tax statutes often contain specific provisions for exemption or exclusion from the use tax¹ and often contain exceptions by way of exclusions in the definition of such terms as "retail sale," "use," "storage," "consumption," or "tangible personal property," to which the tax applies.²

Observation:

If the purchase of tangible property is exempt from the sales tax, its subsequent use is also exempt.³ Likewise, if particular property is subject to the sales tax, it is not subject to the imposition of the use tax in the same taxing state.⁴ State avoid multiple taxation by providing statutory exemptions from the use tax when a sales tax has already been paid in another state.⁵

Common exemptions from the use tax include—

- the use of newspapers.⁶
- the use of food for human consumption.⁷
- the use of medical devices.⁸
- property purchased for use as a licensed carrier of persons and property.⁹
- railroad rolling stock or vessels of a certain displacement used in interstate commerce.¹⁰
- machinery and equipment purchased by a manufacturer for use in new or expanding operations.¹¹
- property purchased by users while nonresidents of the state and brought into the state for their own use.¹²
- property used by contractors who enter into contracts with the federal or state government.¹³
- property purchased for use in research and development.¹⁴
- equipment used in mining activities.¹⁵
- energy sources, such as electricity and coal.¹⁶
- pollution control facilities and equipment used in such facilities.¹⁷
- materials and equipment used in environmental quality processes.¹⁸
- equipment and facilities constituting energy-efficiency improvements.¹⁹
- temporary storage.²⁰

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Indiana Dept. of Revenue v. Kitchin Hospitality, LLC](#), 907 N.E.2d 997 (Ind. 2009); [Concrete Industries, Inc. v. Nebraska Dept. of Revenue](#), 277 Neb. 897, 766 N.W.2d 103 (2009); [Ho-Chunk Nation v. Wisconsin Dept. of Revenue](#), 2009 WI 48, 317 Wis. 2d 553, 766 N.W.2d 738 (2009).
As to the strict construction of use exemptions or exclusions, see § 163.

- 2 [Gammaitoni v. Director of Revenue](#), 786 S.W.2d 126 (Mo. 1990); [Commonwealth, Dept. of Taxation v. Miller-Morton Co.](#), 220 Va. 852, 263 S.E.2d 413 (1980).
The phrase "for ultimate sale at retail" in the General Sales Tax Act excludes from the industrial-processing exemption persons involved in the sale of services. [Jim's Body Shop, Inc. v. Department of Treasury](#), 328 Mich. App. 187, 937 N.W.2d 123 (2019).
- 3 [Knowledge Data Systems v. Utah State Tax Com'n Auditing Div.](#), 865 P.2d 1387 (Utah Ct. App. 1993); [Department of Revenue v. Advanced H2O, LLC](#), 11 Wash. App. 2d 384, 453 P.3d 1011 (Div. 2 2019).
As to property exempt from or not subject to the sales tax, generally, see § 173.
- 4 [State v. Dorhout](#), 513 N.W.2d 390 (S.D. 1994).
As to double taxation by a state, generally, see § 148.
- 5 [CompUSA Stores, L.P. v. State Department of Taxation](#), 142 Haw. 304, 418 P.3d 645 (2018).
- 6 § 189.
- 7 [Sparks Nugget, Inc. v. State ex rel. Dept. of Taxation](#), 124 Nev. 159, 179 P.3d 570 (2008).
- 8 [King Drugs, Inc. v. Com.](#), 250 S.W.3d 643 (Ky. 2008).
- 9 [SFZ Transp., Inc. v. Limbach](#), 66 Ohio St. 3d 602, 1993-Ohio-240, 613 N.E.2d 1037 (1993).
As to the liability of carriers for hire for the use tax, generally, see § 196.
- 10 [Bean Dredging Corp. v. Olsen](#), 742 S.W.2d 259 (Tenn. 1987).
As to use taxes on property acquired or sold in interstate commerce, generally, see § 170.
- 11 § 184.
- 12 [Great Lakes Dredge & Dock Co. v. Norberg](#), 117 R.I. 600, 369 A.2d 1101, 2 A.L.R.4th 847 (1977).
- 13 § 198.
- 14 [Onex Communications Corp. v. Commissioner of Revenue](#), 74 Mass. App. Ct. 643, 909 N.E.2d 53 (2009), decision *aff'd*, 457 Mass. 419, 930 N.E.2d 733 (2010); [Dart Industries, Inc. v. Clark](#), 696 A.2d 306 (R.I. 1997).
- 15 [Internatl. Salt Co. v. Tracy](#), 74 Ohio St. 3d 550, 1996-Ohio-106, 660 N.E.2d 707 (1996).
- 16 [Aztec Partners, LLC v. Indiana Dept. of State Revenue](#), 35 N.E.3d 320 (Ind. Tax Ct. 2015); [State v. Star Enterprise](#), 691 So. 2d 1221 (La. Ct. App. 4th Cir. 1996), writ granted, 679 So. 2d 409 (La. 1996) and *aff'd*, 686 So. 2d 823 (La. 1997).
- 17 [Beelman Truck Co. v. Cosentino](#), 253 Ill. App. 3d 420, 191 Ill. Dec. 605, 624 N.E.2d 454 (5th Dist. 1993); [International Paper Co. v. Board of Environmental Protection](#), 629 A.2d 597 (Me. 1993).
- 18 [White River Environmental Partnership v. Department of State Revenue](#), 694 N.E.2d 1248 (Ind. Tax Ct. 1998).
- 19 [Newman v. Levin](#), 120 Ohio St. 3d 127, 2008-Ohio-5202, 896 N.E.2d 995 (2008).
- 20 [Shared Imaging, LLC v. Hamer](#), 2017 IL App (1st) 152817, 416 Ill. Dec. 416, 84 N.E.3d 398 (App. Ct. 1st Dist. 2017).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 169

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 169. Property acquired in casual, isolated, or occasional sale as exempt from use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3647

A.L.R. Library

[Sales and use taxes: exemption of casual, isolated, or occasional sales, 42 A.L.R.3d 292](#)

Many states expressly exempt from their use tax the use, storage, or consumption of tangible personal property obtained in a casual, isolated, or occasional sale.¹ An exemption for occasional sales also may stem from a definition of "retail sale" that excludes isolated or occasional sales by persons not regularly engaged in business.²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [In re Allied Consolidated Industries, Inc.](#), 602 B.R. 645 (Bankr. N.D. Ohio 2019); [MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration](#), 28 Cal. App. 5th 635, 239 Cal. Rptr. 3d 241 (4th Dist. 2018), review filed, Nov. 5, 2018 and (Nov. 27, 2018) and review denied, (Jan. 2, 2019); [Miller Pipeline Corp. v. Indiana Dept. of State Revenue](#), 52 N.E.3d 973 (Ind. Tax Ct. 2016).

2 [Shakman v. Department of Revenue](#), 2019 IL App (1st) 182197, 2019 WL 6827591 (Ill. App. Ct. 1st Dist. 2019), appeal denied, 437 Ill. Dec. 613, 144 N.E.3d 1203 (Ill. 2020); [Maurer v. Indiana Dept. of State Revenue](#), 607 N.E.2d 985 (Ind. Tax Ct. 1993).
As to an exemption from sales tax for casual, isolated, or occasional sales, generally, see § 97.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 170

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 170. Property acquired or sold in interstate commerce as exempt from use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3609](#), [3639](#), [3641](#), [3650](#)

A.L.R. Library

[Parts and Supplies Used in Repair As Subject to Sales and Use Taxes](#), 113 A.L.R.5th 313

Treatises and Practice Aids

[Hartman and Trost, Federal Limitations on State and Local Tax § 11:6 \(2d ed.\)](#) (Compensating use taxes incident to interstate sales)

Forms

Am. Jur. Pleading and Practice Forms, Sales and Use Taxes § 19 (Complaint, petition, or declaration—By taxpayer—To recover use taxes paid under protest—Insufficient break in interstate commerce to permit collection of use tax)

Some states specifically exempt from the use tax the use of tangible personal property which the state is prohibited from taxing under the Constitution or laws of the United States or under the constitution of the taxing state.¹ Some use-tax statutes expressly exempt from such tax the use of property in interstate transportation or commerce,² or the use of property in operating or maintaining interstate transportation or interstate commerce.³ Some statutes contain a rolling stock exemption to the use tax⁴ which is applicable when there is some significant level of usage of the rolling stock in interstate commerce.⁵ However, materials used to repair equipment which is then used to support interstate commerce are not exempt from the use tax.⁶

An interstate commerce use tax exemption does not exempt from the application of the tax the storage, use, or consumption of tangible personal property which has been purchased in interstate commerce but which has come to rest in the taxing state.⁷ Nor does it exempt from the application of a use tax property which comes to rest in the taxing state before becoming an instrumentality of interstate commerce.⁸

Observation:

A cessation of interstate transportation because of required repairs, maintenance, or temporary idleness does not rob such transportation of its interstate character for purposes of the use tax exemption.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [State Dept. of Revenue v. Orange Beach Marina, Inc.](#), 699 So. 2d 1279 (Ala. Civ. App. 1997); [Colemill Enterprises, Inc. v. Huddleston](#), 967 S.W.2d 753 (Tenn. 1998).
- 2 [In re Tax Appeal of Taylor Crane & Rigging, Inc.](#), 22 Kan. App. 2d 27, 913 P.2d 204 (1995); [Alvan Motor Freight, Inc. v. Department of Treasury](#), 281 Mich. App. 35, 761 N.W.2d 269 (2008); [Colemill Enterprises, Inc. v. Huddleston](#), 967 S.W.2d 753 (Tenn. 1998).
Stipulated facts did not rebut the statutory presumption that aircraft purchased in Oregon and first used outside of Nevada were not subject to Nevada use tax; although the aircraft flight logs showed many flights to and from Las Vegas, the taxpayer's use of the aircraft in Nevada was use in interstate commerce since a flight departing from Nevada nearly always terminated in a flight arriving in another state or country. [Harrah's Operating Co. v. State, Dept. of Taxation](#), 130 Nev. 129, 321 P.3d 850, 130 Nev. Adv. Op. No. 15 (2014).
As to the constitutionality of use-tax statutes with respect to the Commerce Clause, generally, see §§ 155 to 159.
- 3 [Comptroller of Treasury v. Martin G. Imbach, Inc.](#), 101 Md. App. 138, 643 A.2d 513 (1994); [American Steamship Co. v. Limbach](#), 61 Ohio St. 3d 22, 572 N.E.2d 629 (1991).

- 4 National School Bus Service, Inc. v. Department of Revenue, 302 Ill. App. 3d 820, 236 Ill. Dec. 62, 706 N.E.2d 936, 144 Ed. Law Rep. 340 (1st Dist. 1998); Alvan Motor Freight, Inc. v. Department of Treasury, 281 Mich. App. 35, 761 N.W.2d 269 (2008).
- 5 National School Bus Service, Inc. v. Department of Revenue, 302 Ill. App. 3d 820, 236 Ill. Dec. 62, 706 N.E.2d 936, 144 Ed. Law Rep. 340 (1st Dist. 1998).
- 6 Matter of Atchison, Topeka and Santa Fe Ry. Co., 17 Kan. App. 2d 794, 844 P.2d 756 (1993); Midwest Power Line, Inc. v. Department of Treasury, 324 Mich. App. 444, 921 N.W.2d 543 (2018).
- 7 Word of Life Christian Center v. West, 936 So. 2d 1226 (La. 2006); Union Cent. Life Ins. Co. v. Lindley, 12 Ohio St. 3d 80, 465 N.E.2d 440 (1984).
- Natural gas diverted from an interstate pipeline to an in-state compressor station in order to power the engines boosting the interstate gas pressure "came to rest" in the state and "became a part of the mass property in the state" and was, therefore, subject to the use taxes. *Columbia Gulf Transmission Co. v. Broussard*, 653 So. 2d 522 (La. 1995).
- 8 Kellogg Co. v. Department of Treasury, 204 Mich. App. 489, 516 N.W.2d 108 (1994).
- 9 Associates Leasing, Inc. v. Iowa State Dept. of Revenue and Finance, 456 N.W.2d 210 (Iowa 1990).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 171

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 171. Property acquired or sold in interstate commerce as exempt from use tax—Delivery of goods to common carrier

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3609, 3639, 3641

When a seller delivers goods at a point inside the taxing state to an independent common or contract carrier for delivery outside the taxing state, the transaction is not a taxable use by the purchaser in the taxing state if: (1) the seller pays the carrier for its transportation charge even if the seller is later reimbursed by the purchaser; or (2) the seller is shown on the waybill or bill of lading as the shipper even if the purchaser has contracted with the carrier for the transportation service and pays the carrier directly.¹ However, the purchaser is deemed to be receiving the physical possession of and thus using such property in the taxing state if the purchaser hires and pays the carrier directly and is shown on the shipping document as the consignor or shipper as well as being the consignee.²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

¹ [Union Elec. Co. v. Department of Revenue, 136 Ill. 2d 385, 144 Ill. Dec. 769, 556 N.E.2d 236 \(1990\).](#)

² [Union Elec. Co. v. Department of Revenue, 136 Ill. 2d 385, 144 Ill. Dec. 769, 556 N.E.2d 236 \(1990\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 172

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 172. Sale or use of property which has previously been taxed as exempt from use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3630, 3639](#)

The use tax is not collected on the use, storage, or consumption of tangible personal property if the sale thereof has already been taxed under the state's sales tax or the sales tax imposed by another state in which the property has been sold or by a use tax imposed by some other state in which the property has been used.¹

Caution:

A use tax exemption for transactions subject to the sales tax does not have the effect of exempting any in-state transaction from the use tax whenever a sales tax applies without regard to whether the sales tax has actually been collected by the vendor.²

- 1 [Arizona Dept. of Revenue v. Arizona Public Service Co.](#), 188 Ariz. 232, 934 P.2d 796 (Ct. App. Div. 1 1997);
[Combustion Engineering, Inc. v. Department of Treasury](#), 216 Mich. App. 465, 549 N.W.2d 364 (1996);
[Hearthstone, Inc. v. Hardy Moyers](#), 809 S.W.2d 888 (Tenn. 1991).
As to the constitutionality of double or multiple taxation, generally, see § 148.
- 2 [William Raveis Real Estate, Inc. v. Commissioner of Revenue Services](#), 43 Conn. App. 744, 686 A.2d 519
(1996).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 173

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 173. Property exempt from or not subject to sales tax as exempt from use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3630, 3639](#)

The use of property which is not subject to the sales tax normally is not subject to the use tax.¹ Thus, some use-tax statutes specifically exempt from the tax those sales, transactions, or property which are exempt from the sales tax² or property brought into the state which if purchased or acquired in the state would not be subject to the sales tax.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Boyd Bros. Transp., Inc. v. State Dept. of Revenue](#), 976 So. 2d 471 (Ala. Civ. App. 2007); [Cladding Technology, Inc. v. State By and Through Clayburgh](#), 1997 ND 84, 562 N.W.2d 98 (N.D. 1997).
- 2 [President Casino, Inc. v. Director of Revenue](#), 219 S.W.3d 235 (Mo. 2007); [Department of Revenue v. Advanced H2O, LLC](#), 11 Wash. App. 2d 384, 453 P.3d 1011 (Div. 2 2019).
- 3 [Cladding Technology, Inc. v. State By and Through Clayburgh](#), 1997 ND 84, 562 N.W.2d 98 (N.D. 1997); [American Steamship Co. v. Limbach](#), 61 Ohio St. 3d 22, 572 N.E.2d 629 (1991).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 174

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 174. Property acquired for resale or sublease as exempt from use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3644](#), [3646](#), [3648](#)

Forms

[Am. Jur. Legal Forms 2d § 227:3](#) (Certificate from purchaser to seller—Property purchased for resale—Sales tax exemption—Purchase for resale)

The use tax generally applies to retail transactions and not to transactions where items are purchased for resale.¹ Under the sale-for-resale exception, when the purchaser's intent in buying goods or services is to resell them to yet another purchaser without changing the goods or services in any way, the original purchase is not considered a "retail sale" and is therefore not subject to sales tax or use tax.² Any sale to a purchaser who leases, rents, or resells the purchased item prior to making any significant use of it is exempt from the use tax.³

Elements of the resale exception to the use tax are (1) a transfer, barter, or exchange; (2) of the title or ownership of tangible personal property or the right to use, store, or consume the same; and (3) for consideration paid or to be paid.⁴ Similarly, to qualify for the lease-for-sublease exception to the use tax, the taxpayers must show that they (1) leased tangible personal property for sublease, (2) subleased the property in its regular course of business, and (3) did not make an intervening use of the property before sublease.⁵ The requirement of the receipt of valuable consideration does not necessitate that checks exchange

hands, that the amount paid be the exact amount stated in the lease agreement, or that actual benefit be shown. Furthermore, "valuable consideration" does not require a showing of profit, and courts are not in a position to estimate the value or determine the adequacy of consideration.⁶

Practice Tip:

When a taxpayer claims a statutory resale exemption from the use tax, it is presumed that the taxpayer is storing, using, or otherwise consuming the property and is subject to the use tax; thus, with regard to the use tax, liability for the tax is the rule and exemption from the tax is the exception.⁷ The burden of proof that a sale of tangible personal property is not a sale at retail is upon the wholesale merchant or retailer who makes the sale unless that person obtains from the purchaser a certificate that the property is for resale. To overcome the presumption of a retail sale, a taxpayer must present either a certificate of resale or other written evidence to support an assertion that the property has been purchased for resale.⁸ An underlying contract which provides that title vests in another entity is sufficient to render the purchase of goods exempt from the use tax under a sale-for-resale exception.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue](#), 242 Ariz. 85, 393 P.3d 146 (Ct. App. Div. 1 2017); [Black Hills Truck & Trailer, Inc. v. South Dakota Dept. of Revenue](#), 2016 SD 47, 881 N.W.2d 669 (S.D. 2016).
"Use" is defined as including the exercise of right or power over tangible personal property but not the sale of that property in the regular course of business. This means that the use tax, consistent with its complementary relationship to sales tax, generally applies to retail transactions and not to transactions where items are purchased for resale. [Paul Nelson Farm v. South Dakota Dept. of Revenue](#), 2014 SD 31, 847 N.W.2d 550 (S.D. 2014).
As to the application of such provisions to containers and packaging material, see § 183.
As to the constitutional implications of multiple taxation, generally, see § 148.
- 2 [Pi In The Sky, L.L.C. v. Testa](#), 155 Ohio St. 3d 113, 2018-Ohio-4812, 119 N.E.3d 417 (2018).
- 3 [Gracie, LLC v. Idaho State Tax Com'n](#), 149 Idaho 570, 237 P.3d 1196 (2010).
- 4 [DI Supply I, LLC v. Director of Revenue](#), 601 S.W.3d 195 (Mo. 2020).
Statutory sale-for-resale exemption did not exempt a taxpayer's online vehicle-advertising business from paying use tax on its purchases of domain names; although the domain names were purchased for or on behalf of the taxpayer's customers, the taxpayer used the domain names to build websites that remained registered in the taxpayer's name, and the domain names were never sold to customers. [Carsforsale.com, Inc. v. South Dakota Department of Revenue](#), 2019 SD 4, 922 N.W.2d 276 (S.D. 2019).
- 5 [Department of Revenue v. Advanced H2O, LLC](#), 11 Wash. App. 2d 384, 453 P.3d 1011 (Div. 2 2019).
The record supported a finding by the Board of Tax Appeals that a taxpayer did not purchase an aircraft for purposes of leasing it to others as part of a business enterprise and, thus, did not satisfy engaging in business requirement of sale-for-resale exception to use tax for purchase of aircraft, which it had leased to its sole corporate member, though the taxpayer held a vendor's license authorizing it to make taxable sales and receive payments under a lease agreement; the revenue the taxpayer received was under a lease lacking in substance and of doubtful arm's length character, given that the lease prescribed a low rental rate compared

to the value of the aircraft, the president of the sole corporate member signed the lease on behalf of both the corporate member and the taxpayer, and many of the logged flights were to or from the president's lakefront home. [Pi In The Sky, L.L.C. v. Testa](#), 155 Ohio St. 3d 113, 2018-Ohio-4812, 119 N.E.3d 417 (2018).

6 [Business Aviation, LLC v. Director of Revenue](#), 579 S.W.3d 212 (Mo. 2019).

A professional baseball team demonstrated that ticket holders furnished consideration for the team's promise to hand out promotional items at games through payment of money included in the ticket price, such that the team was entitled to a sale-for-resale exemption from use tax for its purchase of promotional items based on its intent to sell items rather than provide them for free; evidence was presented that the team offered promotional items at less desirable games and advertised when specific items would be distributed, that fans purchased tickets to specific games with an expectation of receiving an item, that the team attempted to purchase enough items to provide one to each fan in attendance, and that the items were distinct from unexpected or gratuitous items, like a caught foul ball. [Cincinnati Reds, L.L.C. v. Testa](#), 155 Ohio St. 3d 512, 2018-Ohio-4669, 122 N.E.3d 1178 (2018).

7 [Gracie, LLC v. Idaho State Tax Com'n](#), 149 Idaho 570, 237 P.3d 1196 (2010).

8 [Matter of Assessment of Additional Sales and Use Tax Against Strawbridge Studios, Inc., for Period Sept. 1, 1979 Through July 31, 1982](#), 94 N.C. App. 300, 380 S.E.2d 142 (1989).

A taxpayer failed to rebut the presumption that proposed assessment of use tax on the purchase of air compressor for \$12,647 was valid, despite a claim that the purchase fell under the purchase for resale exemption; from the testimony of the taxpayer's controller, during which he stated that, when the compressors were purchased, some were used on trucks for the taxpayer while others were installed on trucks sold to customers, it was impossible to determine whether the taxpayer's purpose in acquiring the compressor was for the purpose of resale or for its own use. [Miller Pipeline Corp. v. Indiana Dept. of State Revenue](#), 52 N.E.3d 973 (Ind. Tax Ct. 2016).

9 [McDonnell Douglas Corp. v. Director of Revenue](#), 945 S.W.2d 437 (Mo. 1997).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 175

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 175. Property acquired for resale or sublease as exempt from use tax—Use and resale of property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3646, 3648

A.L.R. Library

[Cable Television Equipment or Services as Subject to Sales or Use Tax, 23 A.L.R.6th 165](#)

When personal property is both used and resold by a manufacturer, a conflict frequently arises over a state's right to impose a use tax.¹ The "primary purpose" or "true object" test has been developed by the courts to resolve this conflict.² To determine whether a taxpayer's purchase of tangible personal property is for resale, as would be exempt from use tax, a court asks whether the primary purpose of the purchase was the acquisition of the item for resale in an unaltered condition and basically unused by the taxpayer.³ If, after considering (1) the actual conduct of the purchaser subsequent to the disputed purchase; (2) the nature of the purchaser's contractual obligations, if any, to use, alter, or consume the property to produce goods or perform services; (3) the degree to which the items in question are essential to the purchaser's performance of those obligations; (4) the degree to which the purchaser controls the manner in which the items are used, altered, or consumed prior to their transfer to third parties; and (5) the degree to which the form, character, or composition of the items when transferred to third parties differs from the form, character, or composition of those items at the time they were initially purchased, a court concludes that the purchaser

acquired the property at issue primarily for resale in an unaltered condition and basically unused, the use tax cannot apply even if the purchaser were to make minor use of the item.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Burroughs Corp. v. State Bd. of Equalization](#), 153 Cal. App. 3d 1152, 200 Cal. Rptr. 816 (3d Dist. 1984); [Datascope Corp. v. Tax Appeals Tribunal of State of N.Y.](#), 196 A.D.2d 35, 608 N.Y.S.2d 562 (3d Dep't 1994).
- 2 [Big Sur Waterbeds, Inc. v. City of Lakewood](#), 2018 COA 147, 440 P.3d 1214 (Colo. App. 2018), cert. denied, 2019 WL 2178087 (Colo. 2019); [Fraternal Order of Police v. South Carolina Dept. of Revenue](#), 332 S.C. 496, 506 S.E.2d 495 (1998).
- 3 [American Multi-Cinema, Inc. v. City of Aurora](#), 2020 COA 4, 2020 WL 34677 (Colo. App. 2020).
A city's use tax did not apply to furniture retailers' purchases of furniture they displayed in their showrooms; although furniture remained in showrooms for an average of six to 12 months, it was eventually sold in an unaltered condition and basically unused, at generally the same price terms as warehouse furniture. [Big Sur Waterbeds, Inc. v. City of Lakewood](#), 2018 COA 147, 440 P.3d 1214 (Colo. App. 2018), cert. denied, 2019 WL 2178087 (Colo. 2019).
- 4 [Big Sur Waterbeds, Inc. v. City of Lakewood](#), 2018 COA 147, 440 P.3d 1214 (Colo. App. 2018), cert. denied, 2019 WL 2178087 (Colo. 2019).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 176

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 176. Property acquired for resale or sublease as exempt from use tax—Application of resale exemption in particular situations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3646](#), [3648](#)

A.L.R. Library

[Cable Television Equipment or Services as Subject to Sales or Use Tax](#), 23 A.L.R.6th 165

For an item of tangible personal property transferred as part of a resale to escape use taxation under the resale exemption, the item must be a "critical element," "integral part," or "essential part" of the property resold.¹ Consequently, disposable accessory items purchased by restaurants, caterers, vending machine operators, and other eating places for the purpose of using them and providing customers the means by which to consume their food products are not critical elements of the sale of food, and the use of such items is taxable.²

That the cost of particular items, although not separately stated, is calculated into the overall cost of a product or service does not necessarily evidence a "resale."³

A taxpayer, which owned an electric generation facility, engaged in the "use or consumption" of coal and natural gas purchased from out-of-state vendors to generate electricity in state, and thus those purchases were subject to use tax "on the storage, use

or consumption in this state of tangible personal property purchased from a retailer or utility business," though the taxpayer asserted that the coal and natural gas fell outside the scope of the use tax because it held the fuel for resale. At the end of the electric generation process, the coal and natural gas no longer had the same chemical composition they had at the beginning of the process, and no part of the mass of coal or natural gas became part of the electricity, but rather the fuels were combusted at the beginning of the generation process.⁴

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Covenco, Inc. v. Com., 134 Pa. Commw. 314, 579 A.2d 434 \(1990\), order aff'd, 530 Pa. 206, 607 A.2d 1077 \(1992\); State, Dept. of Revenue v. Sanborn Telephone Co-op., 455 N.W.2d 223 \(S.D. 1990\).](#)
- 2 [Dunkin' Donuts Mid-Atlantic Distribution Center Inc. v. Tax Appeals Tribunal of State of N.Y., 225 A.D.2d 903, 639 N.Y.S.2d 168 \(3d Dep't 1996\); Covenco, Inc. v. Com., 134 Pa. Commw. 314, 579 A.2d 434 \(1990\), order aff'd, 530 Pa. 206, 607 A.2d 1077 \(1992\).](#)
A taxpayer, the owner and operator of restaurants, was not entitled to resale exemption from use tax for purchases of non-disposable tableware, cutlery, chairs, tables and similar items for use by its customers; the transfer, barter, or exchange of title or ownership of tangible personal property, or the right to use, store, or consume the same did not occur when the taxpayer provided the chairs, tables, menus, dishes, tableware, and glassware, to supply meals to customers conveniently, and no additional charge was made to the customer for the privilege of sitting in a chair, eating at a table, or using glasses or silverware. [Brinker Missouri, Inc. v. Director of Revenue, 319 S.W.3d 433 \(Mo. 2010\).](#)
- 3 [Weigel v. Commissioner of Revenue, 566 N.W.2d 79 \(Minn. 1997\); American Airlines, Inc. v. Com., Bd. of Finance and Revenue, 542 Pa. 1, 665 A.2d 417 \(1995\); State, Dept. of Revenue v. Sanborn Telephone Co-op., 455 N.W.2d 223 \(S.D. 1990\).](#)
- 4 [Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue, 242 Ariz. 85, 393 P.3d 146 \(Ct. App. Div. 1 2017\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 177

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 177. Leases or rentals as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3644](#)

A.L.R. Library

[Sales and use taxes on leased tangible personal property, 2 A.L.R.4th 859](#)

Whether the lease or rental of personal property is subject to a use tax depends upon the terms of the statute in the particular jurisdiction and the court's construction thereof.¹ Some use-tax statutes expressly apply to the use of leased or rented property.² The taxability of leases and rentals under other statutes is affected by the inclusion of such transactions within the definitions of "use," "sale," or "purchase"³ or by the exclusion of such transactions from those definitions.⁴

If a lease transaction is found to be subject to the use tax, generally, it is the lessor who is taxed as the user of the leased property⁵ although lessees in some instances are liable for the use tax.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Matter of Thermoset Plastics, Inc., 473 N.W.2d 136 (S.D. 1991).
Control is the critical factor in determining in the context of imposing a sales and use tax whether any type
of transfer of possession, including a lease, has occurred. *Comptroller of Treasury v. J/Port, Inc.*, 184 Md.
App. 608, 967 A.2d 253 (2009).
- 2 *Glass v. Department of Revenue State of Fla.*, 650 So. 2d 684 (Fla. 5th DCA 1995); *Bob Hook Chevrolet*
Isuzu, Inc. v. Com. Transp. Cabinet, 983 S.W.2d 488 (Ky. 1998); *Matter of Thermoset Plastics, Inc.*, 473
N.W.2d 136 (S.D. 1991); *Rent-A-Center West, Inc. v. Utah State Tax Com'n*, 2016 UT 1, 367 P.3d 989
(Utah 2016).
- 3 *Midland Asphalt Corp. v. Chu*, 136 A.D.2d 851, 523 N.Y.S.2d 697 (3d Dep't 1988); *Lily Truck Leasing*
Corp. of Rhode Island v. Clark, 556 A.2d 565 (R.I. 1989); *Cape Fear Paging Co. v. Huddleston*, 937 S.W.2d
787 (Tenn. 1996).
- 4 *Department of Revenue v. Horne Directory, Inc.*, 105 Wis. 2d 52, 312 N.W.2d 820 (1981).
- 5 *Cox Cable New Orleans, Inc. v. City of New Orleans*, 664 So. 2d 742 (La. Ct. App. 4th Cir. 1995), on reh'g
in part, (Dec. 19, 1995) and writ denied, 668 So. 2d 364 (La. 1996) and writ denied, 668 So. 2d 365 (La.
1996); *American Tel. & Tel. Co. v. State Tax Assessor*, 652 A.2d 107 (Me. 1995).
- 6 *Bamma Leasing Co., Inc. v. Secretary of Dept. of Revenue and Taxation*, 646 So. 2d 917 (La. Ct. App. 5th
Cir. 1994), writ denied, 648 So. 2d 380 (La. 1994) (lease of car); *Matter of Thermoset Plastics, Inc.*, 473
N.W.2d 136 (S.D. 1991).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 178

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 178. Services as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3645](#), [3650](#), [3658](#)

In some states, services are not subject to the use tax.¹ In other states, however, services are expressly subject to the use tax.² When the use tax is imposed on the "use, storage, or other consumption" of tangible personal property, "other consumption" may be defined to include receipt of the benefits of a service by the person who has purchased the service.³

Sometimes, there is a question whether a transaction is a sale at retail in which case the use of the property sold is subject to a use tax or whether it is the rendition of a service for which no use tax will apply.⁴ If a product is provided in conjunction with services, the courts examine the totality of the transaction to determine its taxability.⁵

If the purchase of the subject tangible personal property and any accompanying services are severable and distinct transactions, the services will not be taxed absent statutory authority.⁶ Under some authority, therefore, the tangible property aspect of a mixed transaction is taxed and the service aspect of the transaction is not taxed.⁷ If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred.⁸ When consequential services are intertwined with tangible personal property, the critical factor determining whether the buyer has intended to buy an individual's skills or the tangible end product of those skills is the buyer's end use of the tangible product.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Appeal of AT & T Technologies, Inc., 242 Kan. 554, 749 P.2d 1033 (1988).
- 2 Hospitality Temps Corp. v. District of Columbia, 926 A.2d 131 (D.C. 2007); Carsforsale.com, Inc. v. South Dakota Department of Revenue, 2019 SD 4, 922 N.W.2d 276 (S.D. 2019).
Accounting and legal services that the taxpayer obtained from out-of-state firms for his engineering service business were subject to the use tax. Mauch v. South Dakota Dept. of Revenue and Regulation, 2007 SD 90, 738 N.W.2d 537 (S.D. 2007).
Routers and switches constituted computer equipment, and therefore training courses on routers and switches were subject to use tax imposed on computer training services; the taxation statute did not limit taxation to courses involving training on computers, rather the statute levied tax on instruction provided in conjunction with and to support the operation of computer equipment or systems. Global Knowledge Training, L.L.C. v. Levin, 127 Ohio St. 3d 34, 2010-Ohio-4411, 936 N.E.2d 463 (2010).
- 3 Quotron Systems, Inc. v. Limbach, 62 Ohio St. 3d 447, 584 N.E.2d 658 (1992).
- 4 Department of Revenue v. Ocala Breeders' Sales, Inc., 725 So. 2d 387 (Fla. 5th DCA 1998); Community Mut. Ins. Co. v. Tracy, 73 Ohio St. 3d 371, 1995-Ohio-296, 653 N.E.2d 220 (1995); Eaton Kenway, Inc. v. Auditing Div. of Utah State Tax Com'n, 906 P.2d 882 (Utah 1995).
- 5 Communications and Cable of Chicago, Inc. v. Department of Revenue of City of Chicago, 275 Ill. App. 3d 680, 211 Ill. Dec. 695, 655 N.E.2d 1078 (1st Dist. 1995).
- 6 New England Tel. & Tel. Co. v. Clark, 624 A.2d 298 (R.I. 1993).
- 7 Dell, Inc. v. Superior Court, 159 Cal. App. 4th 911, 71 Cal. Rptr. 3d 905 (1st Dist. 2008).
- 8 Sneary v. Director of Revenue, 865 S.W.2d 342, 27 A.L.R.5th 959 (Mo. 1993); Sharp v. Direct Resources for Print, Inc., 910 S.W.2d 535 (Tex. App. Austin 1995), writ denied, (Apr. 4, 1996).
The true object test, which courts use in determining whether a use tax may be applied to transactions with tangible and intangible aspects, requires a court to analyze the totality of the circumstances to determine whether the true object of the transaction is the acquisition of tangible personal property, which is subject to use tax, or the acquisition of intangible services, which is not subject to use tax. If the true object is for tangible personal property, then the use tax applies; but, if the true object is for intangible property or services, then it does not. American Multi-Cinema, Inc. v. City of Aurora, 2020 COA 4, 2020 WL 34677 (Colo. App. 2020).
- 9 Consolidated Freightways Corp. of Delaware v. State, Dept. of Revenue and Taxation, 112 Idaho 652, 735 P.2d 963 (1987).
As to personal services in this regard, see § 179.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 179

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax


2. Particular Transactions as Exempt from Use Tax

a. In General

§ 179. Services as subject to use tax—Personal services

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  [3645](#), [3658](#)

Some courts make a distinction between personal services which are not subject to the use tax and services such as data processing services which are subject to the use tax.¹ However, the service rendered by the person or entity sought to be taxed need not be specifically "customized" for a particular customer in order to qualify as a personal service transaction excepted from the use tax.²

Practice Tip:

To guide in making such a determination, states that do not tax services employ a "true object," "essence of the transaction," or "predominant ingredient" test to decide whether the personal service component of a transaction also involving tangible personal property is sufficient to deem the transaction an essentially personal service transaction rather than a sale.³

Footnotes

- 1 CCH Computax, Inc. v. Tracy, 68 Ohio St. 3d 86, 1993-Ohio-238, 623 N.E.2d 1178 (1993).
- 2 WBNS TV, Inc. v. Tracy, 75 Ohio St. 3d 572, 1996-Ohio-301, 664 N.E.2d 938 (1996).
- 3 MCI Airsignal, Inc. v. State Bd. of Equalization, 1 Cal. App. 4th 1527, 2 Cal. Rptr. 2d 746 (1st Dist. 1991); Sharp v. Direct Resources for Print, Inc., 910 S.W.2d 535 (Tex. App. Austin 1995), writ denied, (Apr. 4, 1996); Mark O. Haroldsen, Inc. v. State Tax Com'n, 805 P.2d 176 (Utah 1990).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 180

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 180. Computer software as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3653

A.L.R. Library

[Applicability of State Sales and Use Tax Exemptions for Custom Programs Prepared to Special Order of Customer, 50 A.L.R.6th 261](#)

[Computer software or printout transactions as subject to state sales or use tax, 36 A.L.R.5th 133](#)

The use of electronic data processing services and related software may be expressly exempt from the use tax.¹ In other jurisdictions, the use of computer software may be expressly subject to the use tax,² or subject to the use tax depending on whether the computer software has been customized for the customer's own needs.³

When no statute specifically governs the taxability of computer software, its taxability often depends on whether the software is deemed tangible personal property, in which case it is taxable, or intangible personal property, in which case it is not.⁴ Here, too, the distinction between customized or "application" software and noncustomized, "canned," "rented," or "operational" software often is important⁵ as is the relative value of the medium by which the information is conveyed.⁶

Footnotes

- 1 [Pennsylvania and West Virginia Supply Corp. v. Rose](#), 179 W. Va. 317, 368 S.E.2d 101 (1988).
- 2 [Ball Aerospace & Technologies Corp. v. City of Boulder](#), 2012 COA 153, 304 P.3d 609 (Colo. App. 2012); [Pan Am World Services, Inc. v. Jackson](#), 754 S.W.2d 53 (Tenn. 1988).
- 3 [Dechert LLP v. Com.](#), 922 A.2d 87 (Pa. Commw. Ct. 2007), [decision aff'd](#), 606 Pa. 334, 998 A.2d 575 (2010); [Eaton Kenway, Inc. v. Auditing Div. of Utah State Tax Com'n](#), 906 P.2d 882 (Utah 1995); [Wisconsin Dept. of Revenue v. Menasha Corp.](#), 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95 (2008).
- 4 [Wal-Mart Stores, Inc. v. City of Mobile](#), 696 So. 2d 290 (Ala. 1996); [South Cent. Bell Telephone Co. v. Barthelemy](#), 643 So. 2d 1240, 36 A.L.R.5th 689 (La. 1994); [Zip Sort, Inc. v. Commissioner of Revenue](#), 567 N.W.2d 34 (Minn. 1997); [Community Mut. Ins. Co. v. Tracy](#), 73 Ohio St. 3d 371, 1995-Ohio-296, 653 N.E.2d 220 (1995).
- 5 [General Business Systems, Inc. v. State Bd. of Equalization](#), 162 Cal. App. 3d 50, 208 Cal. Rptr. 374 (1st Dist. 1984); [United Design Corp. v. State ex rel. Oklahoma Tax Com'n](#), 1997 OK 43, 942 P.2d 725 (Okla. 1997), as corrected, (June 19, 1997).
- 6 [Zip Sort, Inc. v. Commissioner of Revenue](#), 567 N.W.2d 34 (Minn. 1997).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 181

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 181. Computer software subject to use tax—"Essence of transaction" test

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3653

A.L.R. Library

[Applicability of State Sales and Use Tax Exemptions for Custom Programs Prepared to Special Order of Customer](#), 50 A.L.R.6th 261

[Computer software or printout transactions as subject to state sales or use tax](#), 36 A.L.R.5th 133

A number of courts apply an "essence of the transaction" test to determine whether or not the use of computer programs and data is taxable.¹ Under this test, if the medium in which the information resides is merely incidental to the reason for the purchase, the information is intangible personal property and thus not taxable. If, however, the medium in which the information resides is essential or necessary to the reason for the purchase, the transferred information is tangible personal property and is taxable.² Thus, in the states which apply the test, customized computer software is deemed intangible personal property and as such is not subject to the compensating use-tax act which specifically applies only to tangible personal property³ because the tangible media by which it is conveyed is incidental to the primary purpose of the transaction.⁴ When the computer software is not customized, it is tangible personal property subject to a use tax.⁵

Other jurisdictions refuse to apply this test, holding that the intangible information embodied in the computer program cannot be separated from the tangible material used to convey that information; thus, software conveyed by any tangible means is taxable as tangible personal property.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Zip Sort, Inc. v. Commissioner of Revenue](#), 567 N.W.2d 34 (Minn. 1997); [Mark O. Haroldsen, Inc. v. State Tax Com'n](#), 805 P.2d 176 (Utah 1990).
- 2 [Zip Sort, Inc. v. Commissioner of Revenue](#), 567 N.W.2d 34 (Minn. 1997).
- 3 [Appeal of AT & T Technologies, Inc.](#), 242 Kan. 554, 749 P.2d 1033 (1988); [United Design Corp. v. State ex rel. Oklahoma Tax Com'n](#), 1997 OK 43, 942 P.2d 725 (Okla. 1997), as corrected, (June 19, 1997).
- 4 [James v. TRES Computer Service, Inc.](#), 642 S.W.2d 347 (Mo. 1982); [Globe Life and Acc. Ins. Co. v. Oklahoma Tax Com'n](#), 1996 OK 39, 913 P.2d 1322 (Okla. 1996).
- 5 [Comptroller of the Treasury v. Equitable Trust Co.](#), 296 Md. 459, 464 A.2d 248 (1983); [Eaton Kenway, Inc. v. Auditing Div. of Utah State Tax Com'n](#), 906 P.2d 882 (Utah 1995).
- 6 [South Cent. Bell Telephone Co. v. Barthelemy](#), 643 So. 2d 1240, 36 A.L.R.5th 689 (La. 1994); [Comptroller of the Treasury v. Equitable Trust Co.](#), 296 Md. 459, 464 A.2d 248 (1983); [Citizens and Southern Systems, Inc. v. South Carolina Tax Com'n](#), 280 S.C. 138, 311 S.E.2d 717 (1984).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 182

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 182. Containers or packaging materials as exempt from use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3654

A.L.R. Library

[Sales or use tax upon containers or packaging materials purchased by manufacturer or processor for use with goods he distributes, 4 A.L.R.4th 581](#)

[Reusable soft drink bottles as subject to sales or use taxes, 97 A.L.R.3d 1205](#)

In many states, the use-tax statutes provide an exemption or exception from the use tax for the sale of containers or packaging materials in which the property sold is to be transferred.¹ Some do this by defining a nontaxable "wholesale sale" to include the sales of containers to the manufacturers.² Other statutes provide specific exemptions for certain types of containers³ such as: (1) returnable containers, when the container is sold with its contents or resold for refilling; (2) nonreturnable containers when the container is sold without contents to a person who fills the container and sells the contents and the container together; or (3) containers sold with their contents if the sales price of the contents is not taxed.⁴

Containers and packing materials may be exempt from the use tax as tangible personal property used in the manufacturing process⁵ or in the delivery of other goods sold⁶ or as component parts of tangible personal property.⁷ The mere fact that the

packaging of a product might not always be transferred to the ultimate consumers does not remove the packaging from the manufacturing exclusion from the use tax.⁸

A company that packed and shipped personal goods of military personnel out of Louisiana was not required to pay use tax regarding its purchases of out-of-state materials that it used to construct boxes and crates; none of the materials, which included corrugated cardboard, lumber, nails, and tape, were purchased for use in Louisiana, but rather were purchased for shipment of goods.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Am. Natl. Can Co. v. Tracy](#), 72 Ohio St. 3d 150, 1995-Ohio-42, 648 N.E.2d 483 (1995); [M&M/Mars, Inc. v. Com.](#), 162 Pa. Commw. 375, 639 A.2d 848 (1994), order aff'd, 540 Pa. 635, 658 A.2d 797 (1995).
- 2 [State Dept. of Revenue v. Adolph Coors Co.](#), 724 P.2d 1341 (Colo. 1986).
- 3 [Tivoli Enterprises, Inc. v. Zehnder](#), 297 Ill. App. 3d 125, 231 Ill. Dec. 631, 696 N.E.2d 1202 (2d Dist. 1998); [R.R. Donnelley & Sons Co. v. Indiana Dept. of State Revenue](#), 41 N.E.3d 1053 (Ind. Tax Ct. 2015); [Parkdale America, LLC v. Hinton](#), 200 N.C. App. 275, 684 S.E.2d 458 (2009).
- 4 [South Texas Chlorine, Inc. v. Bullock](#), 792 S.W.2d 275 (Tex. App. Austin 1990).
- 5 [General Motors Corp. v. Indiana Dept. of State Revenue](#), 578 N.E.2d 399 (Ind. Tax Ct. 1991), aff'd, 599 N.E.2d 588 (Ind. 1992); [M&M/Mars, Inc. v. Com.](#), 162 Pa. Commw. 375, 639 A.2d 848 (1994), order aff'd, 540 Pa. 635, 658 A.2d 797 (1995).
As to an exemption for the use of property in the manufacturing process, generally, see § 184.
- 6 [House of Lloyd, Inc. v. Director of Revenue](#), 884 S.W.2d 271 (Mo. 1994).
- 7 [State Dept. of Revenue v. Adolph Coors Co.](#), 724 P.2d 1341 (Colo. 1986); [Matter of Thermoset Plastics, Inc.](#), 473 N.W.2d 136 (S.D. 1991).
As to the exemption for component parts of manufactured or processed articles, generally, see § 186.
- 8 [M&M/Mars, Inc. v. Com.](#), 162 Pa. Commw. 375, 639 A.2d 848 (1994), order aff'd, 540 Pa. 635, 658 A.2d 797 (1995).
- 9 [American Moving and Storage of Leesville, Inc. v. Bridges](#), 53 So. 3d 581 (La. Ct. App. 3d Cir. 2010), writ denied, 58 So. 3d 476 (La. 2011).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 183

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

a. In General

§ 183. Containers or packaging materials as exempt from use tax— Inclusion under exemption granted to uses of property purchased for resale

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3654

A.L.R. Library

[Sales or use tax upon containers or packaging materials purchased by manufacturer or processor for use with goods he distributes, 4 A.L.R.4th 581](#)

[Reusable soft drink bottles as subject to sales or use taxes, 97 A.L.R.3d 1205](#)

Often, containers and packing materials are exempt from the use tax under an exemption granted to uses of property purchased for resale.¹ No separate consideration for the container need be paid by the customer upon the resale in order for the exemption to apply as long as the cost of the container is factored into the ultimate resale price.² However, when the packaging materials do not pass to the ultimate consumer together with the property originally contained therein, the use of such materials by the manufacturer is subject to the use tax.³ Likewise, purchases of disposable concession items such as cups, straws, and other containers are subject to the use tax.⁴

Footnotes

- 1 [Ragland v. Mountain Valley Spring Co.](#), 287 Ark. 4, 696 S.W.2d 710 (1985); [Sipco, Inc. v. Director of Revenue](#), 875 S.W.2d 539 (Mo. 1994).
As to an exemption from the use tax for the uses of property purchased for resale, generally, see § 175.
- 2 [Exxon Corp. v. Schofield](#), 583 So. 2d 1195 (La. Ct. App. 1st Cir. 1991), writ denied, 588 So. 2d 103 (La. 1991); [Sipco, Inc. v. Director of Revenue](#), 875 S.W.2d 539 (Mo. 1994).
- 3 [Exxon Corp. v. Schofield](#), 583 So. 2d 1195 (La. Ct. App. 1st Cir. 1991), writ denied, 588 So. 2d 103 (La. 1991).
- 4 [Tivoli Enterprises, Inc. v. Zehnder](#), 297 Ill. App. 3d 125, 231 Ill. Dec. 631, 696 N.E.2d 1202 (2d Dist. 1998).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 184

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

b. Manufacturing or Processing as Subject to Use Tax

§ 184. Machinery, equipment, and materials used in manufacturing or processing as subject to use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3657

A.L.R. Library

[Parts and Supplies Used in Repair As Subject to Sales and Use Taxes](#), 113 A.L.R.5th 313

[Items or Materials Exempt From Use Tax as Becoming Component Part or Ingredient of Manufactured or Processed Article](#), 89 A.L.R.5th 493

Use-tax statutes commonly stipulate in varying phraseology either by way of express exemption or by way of exclusion in the definition of the use, storage, or consumption which is the subject of the tax that the tax need not be paid upon the use of machinery, equipment, and materials¹ by manufacturers or processors in manufacturing,² packaging,³ processing,⁴ assembling, or refining other property.⁵ While repairs to equipment and machinery used in manufacturing are not exempt from the imposition of a use tax, the purchase of new or replacement machinery is exempt.⁶

Observation:

The industrial processing exemption to sales and use tax is, in part the product of a targeted legislative effort to avoid double taxation of the end product offered for retail sale or, in other terms, to avoid pyramiding the use and sale tax. Pyramiding occurs when both use and sales taxes are imposed on the production and sale of retail goods.⁷ Furthermore, the purpose of statutes exempting manufacturers from use tax on equipment used in manufacturing is to encourage new manufacturing industries to located in the state and to encourage existing companies to develop and expand within the state.⁸

The taxpayer has the burden of proof to show that it qualifies for a use tax exemption applicable to materials used or consumed during the manufacturing, processing, compounding, or producing of a product.⁹ When property is simultaneously used for exempt industrial processing activity and nonexempt shipping and distribution activities, the taxpayer is entitled to an industrial processing exemption based on the percentage of the exempt use to the total use as determined by a reasonable formula or method.¹⁰

Practice Tip:

To determine whether the industrial processing exemption to sales and use tax applies, it is necessary to consider the activity in which the equipment is engaged and not the character of the equipment owner's business.¹¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Kerford Limestone Co. v. Nebraska Department of Revenue](#), 287 Neb. 653, 844 N.W.2d 276 (2014); [Sims Bros., Inc. v. Tracy](#), 83 Ohio St. 3d 162, 1998-Ohio-116, 699 N.E.2d 50 (1998).
- 2 [Sherwin-Williams Co. v. Iowa Dept. of Revenue](#), 759 N.W.2d 4 (Iowa Ct. App. 2008), decision aff'd, 789 N.W.2d 417 (Iowa 2010); [Ben Hur Steel Worx, LLC v. Director of Revenue](#), 452 S.W.3d 624 (Mo. 2015). A manufacturing exemption to a use tax was not limited to those taxpayers who were primarily engaged in manufacturing, and therefore a paint manufacturer-retailer was entitled to the exemption for tax on certain machines used in its retail outlets to mix base paint with colorant; the legislature defined the term "manufacturer" in the tax statute, the statute lacked express language that the exemption only be given to businesses primarily engaged in manufacturing, and the legislature had amended the exemption and stated an express intention to broaden its applicability with the amendment. [The Sherwin-Williams Co. v. Iowa Dept. of Revenue](#), 789 N.W.2d 417 (Iowa 2010).

The proper test for determining whether a taxpayer is engaged in manufacturing for purposes of determining liability for use taxes is whether the taxpayer is engaged in an essential and integral step in the manufacturing process. [Onex Communications Corp. v. Commissioner of Revenue](#), 457 Mass. 419, 930 N.E.2d 733 (2010).

3 [Union Carbide Corp. v. Limbach](#), 62 Ohio St. 3d 548, 584 N.E.2d 735 (1992).

4 [Tri-States Double Cola Bottling Co. v. Department of State Revenue](#), 706 N.E.2d 282 (Ind. Tax Ct. 1999); [Ben Hur Steel Worx, LLC v. Director of Revenue](#), 452 S.W.3d 624 (Mo. 2015).

Preparation of food for retail consumption was not "processing" within meaning of a statute exempting from state use tax electrical energy and gas used or consumed in manufacturing, processing, compounding, mining, or producing of any product, and thus, a taxpayer, a convenience store, was not entitled to a use tax exemption on electricity it purchased to power its food preparation operations; legislation did not intent "processing" to include retail food preparation. [Aquila Foreign Qualifications Corp. v. Director of Revenue](#), 362 S.W.3d 1 (Mo. 2012).

5 [Blair v. Taxation Div. Director](#), 225 N.J. Super. 584, 543 A.2d 99 (App. Div. 1988); [D.J.H. Const., Inc. v. Chu](#), 145 A.D.2d 716, 535 N.Y.S.2d 249 (3d Dep't 1988); [Accel, Inc. v. Testa](#), 152 Ohio St. 3d 262, 2017-Ohio-8798, 95 N.E.3d 345 (2017).

6 [Pledger v. C.B. Form Co.](#), 316 Ark. 22, 871 S.W.2d 333 (1994); [Newspaper Agency Corp. v. Auditing Div. of Utah State Tax Com'n](#), 938 P.2d 266 (Utah 1997).

Kitchen equipment used to prepare and cook food in restaurants of a taxpayer did not qualify for an exemption from use tax for replacement machinery, equipment, and parts; machinery, equipment, and parts qualified for exemption only if they were used to establish new or expanded manufacturing, mining, or fabricating plants. [Brinker Missouri, Inc. v. Director of Revenue](#), 319 S.W.3d 433 (Mo. 2010).

7 [Detroit Edison Co. v. Dep't of Treasury](#), 498 Mich. 28, 869 N.W.2d 810 (2015).

8 [Onex Communications Corp. v. Commissioner of Revenue](#), 457 Mass. 419, 930 N.E.2d 733 (2010).

9 [Fred Weber, Inc. v. Director of Revenue](#), 452 S.W.3d 628 (Mo. 2015).

As to presumptions and the burden of proof relating to use tax, generally, see § 140.

10 [Detroit Edison Co. v. Dep't of Treasury](#), 498 Mich. 28, 869 N.W.2d 810 (2015).

11 [Detroit Edison Co. v. Dep't of Treasury](#), 498 Mich. 28, 869 N.W.2d 810 (2015).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 185

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

b. Manufacturing or Processing as Subject to Use Tax

§ 185. Property used "directly" in manufacturing or processing as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3657

A.L.R. Library

[What constitutes direct use within meaning of statute exempting from sales and use taxes equipment directly used in production of tangible personal property, 3 A.L.R.4th 1129](#)

Often, the exemption for uses of machinery and other property in manufacturing or processing tangible personal property applies only when the machinery is used "directly" in the manufacturing process.¹ A requirement that manufacturing machinery, tools, and equipment to be exempt from the use tax be acquired by a person for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property is met when the manufacturing equipment used is an essential and integral part of an integrated production process.² Thus, the mere contemporaneous utilization of tangible personal property during the fabrication of a product does not qualify the user for the exemption.³

Although tax exemption statutes must be strictly construed, the practicalities, actualities, and individual needs of a particular manufacturing process should not be ignored or minimized, nor should legislative intent be sacrificed, when applying the

exemption from sales and use tax for sales of machinery, apparatus, or equipment used directly and primarily in production of tangible personal property by manufacturing, processing, assembling, or refining.⁴

Equipment utilized for the storage and delivery of raw materials prior to the transformation thereof into a finished product is not used or consumed directly in the production of tangible personal property and thus is not exempt from sales and use taxation.⁵ However, if the delivery equipment is used solely to transport partially processed materials to another location where the processing is continued or completed by the same processor, such equipment is used directly in the production of the processed property.⁶

Observation:

Property predominantly used to test and inspect a product throughout the production cycle is considered to be directly used in manufacturing or processing operations.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Walther v. Weatherford Artificial Lift Systems, Inc.](#), 2015 Ark. 255, 465 S.W.3d 410 (2015); [Horsehead Corporation v. Department of Revenue](#), 2019 IL 124155, 2019 WL 6199641 (Ill. 2019); [Liscio's Italian Bakery, Inc. v. Director, Division of Taxation](#), 31 N.J. Tax 249, 2019 WL 4784811 (2019).
- 2 [Tri-States Double Cola Bottling Co. v. Department of State Revenue](#), 706 N.E.2d 282 (Ind. Tax Ct. 1999); [In re Edmiston Oil Co., Inc.](#), 46 Kan. App. 2d 969, 269 P.3d 833 (2012).
Equipment used in retail outlets to mix base paint with colorant were directly used in processing salable paint, and therefore use tax on the equipment was subject to the manufacturing exemption, where the color-matching equipment played an integral role in the actual processing of the paint as it initiated the in-store process of manufacturing usable paint by selecting the formula for the consumer's desired color. [The Sherwin-Williams Co. v. Iowa Dept. of Revenue](#), 789 N.W.2d 417 (Iowa 2010).
- 3 [Ball Corp. v. Limbach](#), 62 Ohio St. 3d 474, 584 N.E.2d 679 (1992).
- 4 [Liscio's Italian Bakery, Inc. v. Director, Division of Taxation](#), 31 N.J. Tax 249, 2019 WL 4784811 (2019).
- 5 [SST & S, Inc. v. State Tax Assessor](#), 675 A.2d 518 (Me. 1996); [Ball Corp. v. Limbach](#), 62 Ohio St. 3d 474, 584 N.E.2d 679 (1992); [Nuclear Fuel Services, Inc. v. Huddleston](#), 920 S.W.2d 659 (Tenn. Ct. App. 1995).
- 6 [Coors Brewing Co. v. Fagan](#), 949 P.2d 110 (Colo. App. 1997); [Zenith Electronics Corp. v. Department of Revenue](#), 293 Ill. App. 3d 651, 228 Ill. Dec. 49, 688 N.E.2d 747 (1st Dist. 1997); [Bird & Son, Inc. v. Limbach](#), 45 Ohio St. 3d 76, 543 N.E.2d 1161 (1989).
- 7 [Lancaster Laboratories, Inc. v. Com.](#), 148 Pa. Commw. 465, 611 A.2d 815 (1992), order aff'd, 534 Pa. 392, 633 A.2d 588 (1993).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 186

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

b. Manufacturing or Processing as Subject to Use Tax

§ 186. Material as component or ingredient of manufactured or processed article as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3657

A.L.R. Library

[Items or Materials Exempt From Use Tax as Becoming Component Part or Ingredient of Manufactured or Processed Article](#),
89 A.L.R.5th 493

Use-tax statutes typically provide an exemption for materials that enter into and become an ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail.¹ Without such an exemption, such materials would in effect be taxed twice, once while in their original condition and then again as part of the final product.²

In determining whether an item is exempt from a use tax, one factor to consider when deciding whether materials are consumed and used in the manufacturing process is whether they become a constituent part of the manufactured product wholly or partially, by either chemical or mechanical means.³ Conversely, material which only accidentally or incidentally becomes incorporated into a finished product and which is not an essential ingredient of the finished product is subject to the use tax.⁴ Excluded from the exemption in some states are "expendable materials," those which are consumed in the manufacturing process.⁵

If property is purchased for incorporation as a component of the finished product, it is not taxable despite the fact that some portion may be lost or otherwise dissipated in the manufacturing process.⁶ However, property which is purchased by the taxpayer, used up in the process of making goods for sale, and unidentifiable in the final product is not exempt from a sales or use tax.⁷ A distinction is made between materials and articles which are "accessories" taxable under the use-tax statutes and components of the final product which contribute to the primary operation of the final product and as such are not taxable.⁸

To prove that a good or service is a "product," for purposes of exemption from sales and use tax for materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product, the taxpayer is not required to actually market the good or service, but the taxpayer must prove the existence of a market. A good or service is a "product" only if it can be marketed to various buyers.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue, 242 Ariz. 85, 393 P.3d 146 \(Ct. App. Div. 1 2017\); Commissioner of Revenue v. Dahmes Stainless, Inc., 884 N.W.2d 648 \(Minn. 2016\); Interventional Center for Pain Management v. Director of Revenue, 592 S.W.3d 350 \(Mo. 2019\); Solvay Chemicals, Inc. v. State, Department of Revenue, 4 Wash. App. 2d 918, 424 P.3d 1238 \(Div. 2 2018\).](#)
As to the application of such statutes to containers and packaging, generally, see § 182.
- 2 [Appeal of K-Mart Corp., 238 Kan. 393, 710 P.2d 1304 \(1985\); Interstate Printing Co. v. Department of Revenue, 236 Neb. 110, 459 N.W.2d 519 \(1990\).](#)
As to double taxation, generally, see § 148.
- 3 [Coors Brewing Company v. City of Golden, Colorado, 2013 COA 92, 411 P.3d 767 \(Colo. App. 2013\).](#)
- 4 [Ragland v. General Tire and Rubber Co., Inc., 297 Ark. 394, 763 S.W.2d 70 \(1989\); Nucor Steel, a Div. of Nucor Corp. v. Leuenberger, 233 Neb. 863, 448 N.W.2d 909 \(1989\); Matter of Thermoset Plastics, Inc., 473 N.W.2d 136 \(S.D. 1991\).](#)
- 5 [Arizona Electric Power Cooperative, Inc. v. Arizona Department of Revenue, 242 Ariz. 85, 393 P.3d 146 \(Ct. App. Div. 1 2017\) \(coal and natural gas used in electricity generated by taxpayer\); State ex rel. Arizona Dept. of Revenue v. Capitol Castings, Inc., 193 Ariz. 89, 970 P.2d 443 \(Ct. App. Div. 1 1998\); Container Corp. of America v. Wagner, 293 Ill. App. 3d 1089, 228 Ill. Dec. 387, 689 N.E.2d 259 \(1st Dist. 1997\).](#)
- 6 [Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization, 160 Cal. App. 4th 514, 72 Cal. Rptr. 3d 857 \(4th Dist. 2008\), as modified on denial of reh'g, \(Mar. 25, 2008\); Fannon & Osmond Photography, Inc. v. Commissioner of Taxation and Finance, 176 A.D.2d 1014, 574 N.Y.S.2d 866 \(3d Dep't 1991\).](#)
- 7 [Doe Run Resource Co. v. Director of Revenue, 982 S.W.2d 269 \(Mo. 1998\); Gull Laboratories, Inc. v. Utah State Tax Com'n, Auditing Div., 936 P.2d 1082 \(Utah Ct. App. 1997\).](#)
- 8 [USAir, Inc. v. Faulkner, 126 N.C. App. 501, 485 S.E.2d 847 \(1997\).](#)
- 9 [Interventional Center for Pain Management v. Director of Revenue, 592 S.W.3d 350 \(Mo. 2019\).](#)

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 187

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

b. Manufacturing or Processing as Subject to Use Tax

§ 187. Property manufactured by user or acquired other than by purchase as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3657

Many use-tax statutes apply to property which is purchased in a sale, and under such statutes, the use of property not so acquired incurs no use tax.¹ A limitation in a use-tax statute that the tangible personal property must be purchased at retail from a retailer excludes from the use tax the use of tangible personal property produced by the user or acquired by the user by way of a gift or in some manner other than by a purchase.² On the other hand, some statutes expressly apply not only to property which is purchased but also to property which is acquired by lease, gift, or bailment, or extracted or produced or manufactured by the person using the same.³

Observation:

In some states, a use tax is imposed on the use within the state of any tangible personal property manufactured, processed, or assembled by the user if items of the same kind are offered for sale by the user in the regular course of business.⁴

Under some statutes, manufacturers who provide marketing aids to persons engaged in selling the manufacturer's products are deemed to be the consumers of the property provided and are liable for the use tax.⁵ Thus, a use tax is applicable to samples of a manufacturer's products distributed free to wholesale and retail dealers⁶ or to the manufacturer's field sales representatives.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Cosmair, Inc. v. Director, New Jersey Div. of Taxation, 109 N.J. 562, 538 A.2d 788 (1988).
- 2 American Can Co. v. Department of Revenue, 47 Ill. 2d 531, 267 N.E.2d 657 (1971); Miles, Inc. v. Indiana Dept. of State Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995).
- 3 Boeing Co. v. State, 74 Wash. 2d 82, 442 P.2d 970 (1968).
- 4 Western Paving Const. Co. v. Beer, 917 P.2d 344 (Colo. App. 1996); Cosmair, Inc. v. Director, New Jersey Div. of Taxation, 109 N.J. 562, 538 A.2d 788 (1988); Boehringer Ingelheim Pharmaceuticals, Inc. v. Tracy, 74 Ohio St. 3d 472, 1996-Ohio-144, 659 N.E.2d 1267 (1996).
- 5 Wallace Berrie & Co. v. State Bd. of Equalization, 40 Cal. 3d 60, 219 Cal. Rptr. 142, 707 P.2d 204 (1985).
- 6 U. S. Gypsum Co. v. Green, 110 So. 2d 409 (Fla. 1959); American Cyanamid Co. v. Huddleston, 908 S.W.2d 396 (Tenn. Ct. App. 1995) (finding that drug samples given to physicians by a pharmaceutical company are subject to the use tax).
- 7 Fedway Associates, Inc. v. Director, Div. of Taxation, 282 N.J. Super. 129, 659 A.2d 536 (App. Div. 1995); Am. Cyanamid Co. v. Tracy, 74 Ohio St. 3d 468, 1996-Ohio-133, 659 N.E.2d 1263 (1996); House of Lloyd v. Com., 684 A.2d 213 (Pa. Commw. Ct. 1996), order aff'd, 694 A.2d 375 (Pa. Commw. Ct. 1997).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 188

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

b. Manufacturing or Processing as Subject to Use Tax

§ 188. Property manufactured by user or acquired other than by purchase subject to use tax—Withdrawal from stock

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3648, 3657

In some states, the definition of a taxable "use" includes the withdrawal of tangible personal property from storage.¹ In other jurisdictions, the statutory scheme may expressly exclude the withdrawal from storage of tangible personal property by the person who has manufactured, processed, or assembled the property.² Even absent an express statutory provision, it has been found that the election to take tangible personal property out of storage to sell it is not a transaction to which a use tax applies³ although it also has been found that the withdrawal from inventory for the free disposition of the property to customers rather than for resale is a taxable use.⁴

Observation:

Activities that are incidental but necessary to the withdrawal from storage for delivery to a common carrier, such as sorting, labeling, packaging, and assembling, are not subject to the use tax.⁵

When the storage of goods in a state is not subject to the use tax because the goods come within an exception for use outside of the taxing state, the withdrawal of those goods from storage for use in another jurisdiction is likewise not subject to the use tax.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Walther v. FLIS Enterprises, Inc.](#), 2018 Ark. 64, 540 S.W.3d 264 (2018); [Cosmair, Inc. v. Director, New Jersey Div. of Taxation](#), 109 N.J. 562, 538 A.2d 788 (1988); [Vermont Structural Steel v. State Dept. of Taxes](#), 153 Vt. 67, 569 A.2d 1066 (1989).
 - 2 [Miles, Inc. v. Indiana Dept. of State Revenue](#), 659 N.E.2d 1158 (Ind. Tax Ct. 1995); [Cosmair, Inc. v. Director, New Jersey Div. of Taxation](#), 109 N.J. 562, 538 A.2d 788 (1988).
 - 3 [Mobil Oil Corp./The Superior Oil Co. v. McNamara](#), 517 So. 2d 278 (La. Ct. App. 1st Cir. 1987).
 - 4 [Commonwealth, Dept. of Taxation v. Miller-Morton Co.](#), 220 Va. 852, 263 S.E.2d 413 (1980).
 - 5 [Cosmair, Inc. v. Director, New Jersey Div. of Taxation](#), 109 N.J. 562, 538 A.2d 788 (1988).
 - 6 [USAir, Inc. v. Indiana Dept. of State Revenue](#), 623 N.E.2d 466 (Ind. Tax Ct. 1993).
- As to the exception from the use tax of the storage of goods to be used outside the state, generally, see § 142.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 189

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

c. Printed Matter Subject to Use Tax

§ 189. Printed matter as subject to use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3650

A.L.R. Library

[Items or Materials Exempt From Use Tax as Becoming Component Part or Ingredient of Manufactured or Processed Article, 89 A.L.R.5th 493](#)

[What constitutes newspapers, magazines, periodicals, or the like, under sales or use tax law exemption, 25 A.L.R.4th 750](#)

Use-tax statutes often exempt the use of newspapers, periodicals, and other printed matter or particular kinds of publications as well as the publisher's use of tangible personal property in producing such items. The underlying purpose for exempting certain types of publications from the burden of use taxes is to protect and promote the exercise of free press as guaranteed under the First Amendment to the United States Constitution. However, allowing a taxpayer to obtain tax-exempt status by simply joining otherwise taxable materials with exempt materials under a single cover and mailing them out on a weekly basis does nothing to further the legislative purpose behind the use tax exemption, and so such practice makes the publication subject to tax.¹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [ADVO-Systems, Inc. v. Department of Treasury](#), 186 Mich. App. 419, 465 N.W.2d 349 (1990). Telephone bills printed by a taxpayer were not "substantially similar" to each other to constitute "printed matter" as required for application of the sales and use tax exemption for printing activities; the bills contained individualized information for each customer regarding calls, dates, times, numbers, and charges. [EUR Systems, Inc. v. Com.](#), 965 A.2d 319 (Pa. Commw. Ct. 2009), order aff'd, 605 Pa. 459, 991 A.2d 307 (2010).
- Coupon books produced and printed by a taxpayer, which contained coupons for local businesses, for inclusion once monthly in the taxpayer's free weekly newspaper were not component parts of a newspaper, and therefore were not exempt from sales and use tax pursuant to the newspaper exemption, where the coupon books differed in size, format, and distribution from the newspaper, the coupon books were separately prepared and printed, the coupon books were not part of the "print run" of the newspaper, the coupon books consisted solely of advertising with no content, the coupon books did not typically command their own following, and the coupon books were not separately indexed sections of the paper. [World Publications, Inc. v. Vermont Dept. of Taxes](#), 192 Vt. 547, 2012 VT 78, 60 A.3d 942 (2012).
- As to the effect of the First Amendment free-press guarantee on use taxes, generally, see § 160.
- As to the constitutionality of taxation of newspapers, see [Am. Jur. 2d, Newspapers, Periodicals and Press Associations](#) §§ 30 to 33.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 190

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

c. Printed Matter Subject to Use Tax

§ 190. Advertising services and materials as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3650

A.L.R. Library

[State or local sales, use, or privilege tax on sales of, or revenues from sales of, advertising space or services, 40 A.L.R.4th 1114](#)

Advertising services may be exempt from use taxation.¹ Charges for advertising in newspapers or magazines may not be taxable. Likewise, charges made by advertising agencies for preparing and placing advertising in advertising media are charges for services and therefore may not be taxable.²

A taxable use of tangible personal property occurs when several advertisers, in concert, pay the costs for producing and distributing a publication that advertises their products.³ However, when a retailer has no in-state contract to print or deliver advertising supplements, and all control over the advertising material within the state belongs either to the post office or the advertisement recipients, the retailer has been found not subject to the use tax⁴ although there is authority to the contrary.⁵

Promotional materials may be exempt from sales and use tax.⁶

Footnotes

- 1 [Carsforsale.com, Inc. v. South Dakota Department of Revenue](#), 2019 SD 4, 922 N.W.2d 276 (S.D. 2019).
As to services subject to use tax, generally, see § 178.
- 2 [Carsforsale.com, Inc. v. South Dakota Department of Revenue](#), 2019 SD 4, 922 N.W.2d 276 (S.D. 2019).
- 3 [Drackett Products Co. v. Limbach](#), 38 Ohio St. 3d 204, 527 N.E.2d 860 (1988).
- 4 [Modern Merchandising, Inc. v. Department of Revenue](#), 397 N.W.2d 470 (S.D. 1986).
As to direct mail materials as subject to use tax, see § 192.
- 5 [American Exp. Travel Related Services Co., Inc. v. Tax Com'n of State of Idaho](#), 128 Idaho 902, 920 P.2d 921 (1996).
- 6 [United Parcel Service, Inc. v. Tax Appeals Tribunal of State](#), 98 A.D.3d 796, 949 N.Y.S.2d 826 (3d Dep't 2012) (shipping supplies and other materials that a common carrier provided free of charge to its customers were exempt promotional materials, where the supplies were purposefully designed for use in the air delivery of packages, with various themes to advertise the common carrier's new overnight air delivery services).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 191

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

c. Printed Matter Subject to Use Tax

§ 191. Advertising services and materials as subject to use tax—Advertising inserts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3650

A.L.R. Library

[State or local sales, use, or privilege tax on sales of, or revenues from sales of, advertising space or services, 40 A.L.R.4th 1114](#)

There are conflicting views concerning the taxability of the use of advertising materials as inserts in newspapers, with some courts holding that such inserts are considered part of the newspaper and thus exempt from the use tax when newspapers are exempt,¹ while others hold that such advertising inserts are not part of the newspaper, and thus, the use of the supplements by the retailer is not entitled to the newspaper exemption.² A retailer's use of advertising supplements is taxable when the retailer directs a publishing company to print the supplements, orders them to be delivered to selected newspapers for distribution, or chooses the distribution date.³

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Appeal of K-Mart Corp.](#), 238 Kan. 393, 710 P.2d 1304 (1985); [Sears, Roebuck & Co. v. State Tax Commission](#), 370 Mass. 127, 345 N.E.2d 893 (1976).

As to the use tax exemption of newspapers, see § 189.

As to the constitutionality of taxation of newspapers, see [Am. Jur. 2d, Newspapers, Periodicals and Press Associations §§ 30 to 33](#).

2 [Service Merchandise Co., Inc. v. Schwartzberg](#), 971 P.2d 654 (Colo. App. 1997), as modified on denial of reh'g, (Mar. 19, 1998); [Collins v. J.C. Penney Co., Inc.](#), 218 Ga. App. 405, 461 S.E.2d 582 (1995); [Sears, Roebuck & Co. v. Woods](#), 708 S.W.2d 374 (Tenn. 1986).

3 [Collins v. J.C. Penney Co., Inc.](#), 218 Ga. App. 405, 461 S.E.2d 582 (1995); [K Mart Corp. v. Idaho State Tax Com'n](#), 111 Idaho 719, 727 P.2d 1147 (1986); [K Mart Corp., Inc. v. South Dakota Dept. of Revenue](#), 345 N.W.2d 55 (S.D. 1984); [Sears, Roebuck & Co. v. Woods](#), 708 S.W.2d 374 (Tenn. 1986).

As to the imposition of a use tax on direct mail materials, generally, see § 192.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 192

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

D. Transactions Subject to Use Tax

2. Particular Transactions as Exempt from Use Tax

c. Printed Matter Subject to Use Tax

§ 192. Direct mail materials as subject to use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3650

A.L.R. Library

[Items or Materials Exempt From Use Tax as Becoming Component Part or Ingredient of Manufactured or Processed Article, 89 A.L.R.5th 493](#)

A retailer's printing and shipping of merchandise catalogs to state residents constitute a taxable use of the catalogs under a statute which provides for the taxation of the storage, use, or consumption in the state of tangible personal property purchased from a retailer despite the retailer's loss of control over the materials under United States Postal Regulations once the materials are deposited in the mail.¹ However, there is also authority to the contrary.²

Observation:

Even when a retailer contracts with an out-of-state third party to print and mail the catalogs to potential customers in the taxing jurisdiction, a use tax applies.³

When as part of its business of selling products in the taxing state, an entity places its catalogs in the stream of commerce and directs to whom they are to be delivered and what should be done with the catalogs which are not deliverable to a designated addressee, the entity exercises in the taxing state a right or power over the catalogs it causes to be prepared and owns and therefore uses the catalogs in the taxing state within the meaning of a statute defining the term "use" for purposes of a use tax.⁴ However, it has also been held that the mailing of product catalogs by a taxpayer, a foreign corporation, to state residents was not "use" within the meaning of the use tax statute. Simply mailing a product from one state into another state was not the exercise of the right or power or control over the property into the other state, which was what the use tax statute required.⁵

A retailer is subject to a use tax based on its distribution of retail catalogs in the taxing state.⁶ However, a retailer is not liable for a use tax in the state from which its catalogs and package inserts are mailed to out-of-state customers as such materials are "used" for marketing purposes outside the state.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Sharper Image Corp. v. Arizona Dept. of Revenue](#), 191 Ariz. 475, 957 P.2d 1369 (Ct. App. Div. 1 1998); [Sharper Image Corp. v. Miller](#), 240 Conn. 531, 692 A.2d 774 (1997); [American Exp. Travel Related Services Co., Inc. v. Tax Com'n of State of Idaho](#), 128 Idaho 902, 920 P.2d 921 (1996).
- 2 [Sharper Image Corp. v. Department of Treasury](#), 216 Mich. App. 698, 550 N.W.2d 596 (1996).
- 3 [Talbots, Inc. v. Schwartzberg](#), 928 P.2d 822 (Colo. App. 1996); [Collins v. J.C. Penney Co., Inc.](#), 218 Ga. App. 405, 461 S.E.2d 582 (1995); [American Exp. Travel Related Services Co., Inc. v. Tax Com'n of State of Idaho](#), 128 Idaho 902, 920 P.2d 921 (1996).
- 4 [Sharper Image Corp. v. Arizona Dept. of Revenue](#), 191 Ariz. 475, 957 P.2d 1369 (Ct. App. Div. 1 1998); [Dell Catalog Sales LP v. NM Taxation & Revenue Dept.](#), 145 N.M. 419, 2009-NMCA-001, 199 P.3d 863 (Ct. App. 2008).
- 5 [Office Depot, Inc. v. Director of Revenue](#), 484 S.W.3d 793 (Mo. 2016).
- 6 [Sharper Image Corp. v. Department of Revenue of State of Fla.](#), 704 So. 2d 657 (Fla. 1st DCA 1997).
- 7 [L.L. Bean, Inc. v. State Tax Assessor](#), 649 A.2d 331 (Me. 1994).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes II E Refs.

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Taxation](#) 🔑 3612, 3660 to 3671

A.L.R. Library

A.L.R. Index, Sales and Use Taxes

West's A.L.R. Digest, [Taxation](#) 🔑 3612, 3660 to 3671

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 193

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.


II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 193. Persons liable for use tax, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3660 to 3671

Forms

[Am. Jur. Pleading and Practice Forms, Sales and Use Taxes § 17](#) (Complaint, petition, or declaration—By state taxing authority—For collection of use tax from resident)

[Am. Jur. Pleading and Practice Forms, Sales and Use Taxes § 20](#) (Complaint, petition, or declaration—Allegation—Retailer's failure to pay use tax)

The use tax is imposed upon the purchaser,¹ user,² storer,³ contractor,⁴ service provider,⁵ or consumer of the tangible personal property⁶ rather than on the retailer.⁷

Observation:

For practical reasons, however, the use tax generally is collected by the retailer at the time the sale is made,⁸ and both retailers and purchasers may be liable to the state for the use tax until it is paid.⁹

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Loeffler v. Target Corp., 58 Cal. 4th 1081, 171 Cal. Rptr. 3d 189, 324 P.3d 50 (2014); MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, 28 Cal. App. 5th 635, 239 Cal. Rptr. 3d 241 (4th Dist. 2018), review filed, Nov. 5, 2018 and (Nov. 27, 2018) and review denied, (Jan. 2, 2019); Southern California Edison v. State Department of Taxation, 133 Nev. 348, 398 P.3d 896 (2017), cert. denied, 138 S. Ct. 746, 199 L. Ed. 2d 607 (2018).
The incidence of the use tax falls directly upon the party that makes an out-of-state purchase and uses the property within the state. Southern California Edison v. State Department of Taxation, 133 Nev. 348, 398 P.3d 896 (2017), cert. denied, 138 S. Ct. 746, 199 L. Ed. 2d 607 (2018).
- 2 S & W Air Vac Systems, Inc. v. Department of Revenue, State of Fla., 697 So. 2d 1313 (Fla. 5th DCA 1997); J & J Snack Foods Sales Corp. v. Director, Division of Taxation, 27 N.J. Tax 532, 2013 WL 6981490 (2013), aff'd, 2015 WL 5518000 (N.J. Super. Ct. App. Div. 2015).
- 3 B.G. Bailey Const. Co. v. Norberg, 524 A.2d 595 (R.I. 1987); Wisconsin Dept. of Revenue v. J. C. Penney Co., Inc., 108 Wis. 2d 662, 323 N.W.2d 168 (Ct. App. 1982).
- 4 Brunt Associates, Inc. v. Dep't of Treasury, 318 Mich. App. 449, 898 N.W.2d 256 (2017).
- 5 Minnesota Twins Partnership v. Commissioner of Revenue, 587 N.W.2d 287 (Minn. 1998); B.L. Key, Inc. v. Utah State Tax Com'n, 934 P.2d 1164 (Utah Ct. App. 1997).
- 6 In re Cessna Employees Credit Union, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012); Andrie Inc. v. Treasury Dept., 496 Mich. 161, 853 N.W.2d 310 (2014); Sprint Spectrum, LP v. State, Dept. of Revenue, 174 Wash. App. 645, 302 P.3d 1280 (Div. 2 2013).
- 7 Terco, Inc. v. Department of Treasury, 127 Mich. App. 220, 339 N.W.2d 17 (1983).
- 8 Loeffler v. Target Corp., 58 Cal. 4th 1081, 171 Cal. Rptr. 3d 189, 324 P.3d 50 (2014); Performance Marketing Ass'n, Inc. v. Hamer, 2013 IL 114496, 375 Ill. Dec. 762, 998 N.E.2d 54 (Ill. 2013).
- 9 Vinson Supply Co. v. State ex rel. Oklahoma Tax Com'n, 1988 OK 107, 767 P.2d 406 (Okla. 1988); Bullock v. Foley Bros. Dry Goods Corp., 802 S.W.2d 835 (Tex. App. Austin 1990), writ denied, (Sept. 5, 1991).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 194

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 194. Liability for use tax when business is sold

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3660, 3661

If a business or stock of goods is sold under a contract providing for payment to the seller of a purchase price in money or property or providing for the assumption of liabilities, the successor or purchaser is required to withhold from the purchase price an amount sufficient to cover the liability of the seller for use taxes, penalties, and interest.¹ When the assets of a business are transferred from a seller to a buyer, the buyer must comply with notification requirements relating to the state taxing agency; if the buyer fails to make the proper notification, the buyer is responsible for the use taxes for which the seller was liable.²

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [In re Western Resources, Inc.](#), 114 B.R. 621 (Bankr. S.D. Ind. 1990) (applying Kentucky law); [Red, White & Blue Transmission, Inc. v. Department of Revenue Services](#), 44 Conn. Supp. 361, 690 A.2d 437, 33 U.C.C. Rep. Serv. 2d 288 (Super. Tax 1994); [Harper v. Director of Revenue](#), 872 S.W.2d 481 (Mo. 1994).
To avoid successor tax liability, the purchaser of a convenience store's assets was required to establish a fund from the purchase price sufficient to cover the seller's unpaid sales and use taxes regardless of whether the other claims were superior to the state's. [Collins v. Lesters, Inc.](#), 225 Ga. App. 405, 484 S.E.2d 62 (1997).
- ² [In re Murgillo](#), 176 B.R. 524 (B.A.P. 9th Cir. 1994) (applying California law); [New Jersey Hotel Holdings, Inc. v. Director, Div. of Taxation](#), 15 N.J. Tax 428, 1996 WL 120498 (1996).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 195

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 195. Liability of public utilities for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3666

Absent statutory authority to the contrary, public utilities are subject to the use tax.¹ Claims of exemption of public utilities from the use tax on materials purchased to carry on their services cannot be based upon the fact that the ultimate economic impact is borne by their customers, the sales of services to whom are expressly exempted from the sales tax.²

In some states, the statutes provide that the term "use" does not include the use or consumption of tangible personal property including but not limited to machinery and equipment, parts therefor, and supplies directly in any of the operations of the producing, delivering, or rendering of a public utility service, or in constructing, reconstructing, remodeling, repairing, or maintaining the facilities which are directly used in such service. The public utility exemption in some states is available to taxpayers who have performed work for municipal entities considered by the courts to be, in effect, legitimate public utilities even if such entities are not in a strict sense public utilities which are regulated by the state public utility code.³ In other states, however, only a public utility service that is so important to the public interest that special regulation and control has been imposed upon it may have its uses exempted.⁴

The tools, equipment, and supplies used by a public utility contractor and not by a public utility itself and which are not affixed to the real estate are not exempt from the use tax.⁵ Likewise, rental equipment used in the construction of public utility projects is not exempt from the use tax under the public utilities exclusion when the equipment is not affixed to real estate or otherwise annexed to the utility.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 City of Chanute v. State Commission of Revenue and Taxation, 156 Kan. 538, 134 P.2d 672 (1943).
2 Connecticut Light & Power Co. v. Walsh, 134 Conn. 295, 57 A.2d 128, 1 A.L.R.2d 453 (1948).
3 Ernest Renda Contracting Co., Inc. v. Com., 516 Pa. 325, 532 A.2d 416 (1987).
4 Weiss v. Best Enterprises, Inc., 323 Ark. 712, 917 S.W.2d 543 (1996); Inland Refuse Transfer Co. v. Limbach,
5 53 Ohio St. 3d 10, 558 N.E.2d 42 (1990); Fiore v. Com., 668 A.2d 1210 (Pa. Commw. Ct. 1995).
6 Glenn Johnston, Inc. v. Com., 712 A.2d 817 (Pa. Commw. Ct. 1998), order aff'd, 556 Pa. 22, 726 A.2d 384
(1999).
G. L. Marks Contracting, Inc. v. Com., 712 A.2d 816 (Pa. Commw. Ct. 1998), aff'd, 555 Pa. 559, 725 A.2d
756 (1999).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 196

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 196. Liability of carriers for hire for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3666

Some states exempt carriers for hire,¹ common carriers,² and public transportation³ from the imposition of use taxes while private carriers are not exempt from the use tax.⁴

Observation:

A carrier for hire or a common carrier often holds a certificate of public convenience which renders the carrier exempt from the use tax.⁵

When the property owner's title in goods is retained after the goods are picked up by the carrier, the carrier is deemed a carrier for hire or a public carrier and is exempt from the use tax.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 Admiral Disposal Co. v. Department of Revenue, 302 Ill. App. 3d 256, 235 Ill. Dec. 858, 706 N.E.2d 118
(2d Dist. 1999).
- 2 Balloons Over the Rainbow, Inc. v. Director of Revenue, 427 S.W.3d 815 (Mo. 2014).
- 3 Klink Trucking, Inc. v. Indiana Department of State Revenue, 79 N.E.3d 1029 (Ind. Tax Ct. 2017).
- 4 Admiral Disposal Co. v. Department of Revenue, 302 Ill. App. 3d 256, 235 Ill. Dec. 858, 706 N.E.2d 118 (2d
Dist. 1999); National Serv-All, Inc. v. Indiana Dept. of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994).
As to distinctions between common carriers and private carriers, generally, see Am. Jur. 2d, Carriers §§ 2
to 4.
- 5 Fiore v. Com., 676 A.2d 723 (Pa. Commw. Ct. 1996), opinion aff'd, 547 Pa. 357, 690 A.2d 234 (1997).
As to the possession and use of certificates of public convenience and necessity by carriers, generally, see
Am. Jur. 2d, Carriers §§ 120 to 135.
- 6 Admiral Disposal Co. v. Department of Revenue, 302 Ill. App. 3d 256, 235 Ill. Dec. 858, 706 N.E.2d 118
(2d Dist. 1999); Indiana Waste Systems of Indiana, Inc. v. Indiana Dept. of State Revenue, 644 N.E.2d 960
(Ind. Tax Ct. 1994).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government
Works.

67B Am. Jur. 2d Sales and Use Taxes § 197

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 197. Liability of government or governmental agency for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3665

Some state constitutions or statutes specifically exempt from the use tax the use of tangible personal property by the United States, its unincorporated agencies or instrumentalities,¹ the state, and any county, city, district, or other political subdivision of the state.²

For instance, an industrial development board created by an incorporated municipality has been found exempt from the use taxes, provided that purchases are made in the name of the board.³ The operator of a city-owned parking garage has also been found exempt from the use taxes.⁴

Conversely, the courts have determined that the following are not exempt from use taxes: a joint transportation commission between two municipalities,⁵ a nonprofit corporation that is formed by a village to finance and build a hotel and convention center,⁶ a nonprofit corporation which operates an information application center providing the private sector with access to technical knowledge accumulated in part by the National Aeronautics and Space Administration,⁷ and a private garbage hauler that contracts to provide services to a municipality.⁸

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- ¹ [Arizona Dept. of Revenue v. Blaze Const. Co., Inc.](#), 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999). As to the federal constitutional principles requiring the exemption of the United States and its agencies from the use tax, generally, see [§ 154](#).

- 2 [Becker Elec. Co., Inc. v. Director of Revenue](#), 749 S.W.2d 403 (Mo. 1988); [Maecon, Inc. v. State Dept. of Taxation](#), 104 Nev. 487, 761 P.2d 411 (1988); [Sublette County School Dist. No. 1 v. State Bd. of Equalization](#), State of Wyo., 770 P.2d 218, 52 Ed. Law Rep. 749 (Wyo. 1989).
- A casino management company was not subject to compensating use tax on electronic gaming machines, since the state, through the Kansas Lottery, was the actual owner of such machines and maintained and exercised all rights and powers incident to that ownership. [Matter of BHCMC, L.L.C.](#), 307 Kan. 154, 408 P.3d 103 (2017).
- A sale to an alleged agent of a political subdivision is a sale to a political subdivision, so as to entitle the agent to a sales and use tax exemption for purchases made by political subdivisions, only if the political subdivision is in actuality the purchaser that is consummating the sale by means of its agent, with the political subdivision thereby assuming and bearing the primary and essential liability to the vendor, rather than the agent doing so. [Cincinnati Golf Mgt., Inc. v. Testa](#), 132 Ohio St. 3d 299, 2012-Ohio-2846, 971 N.E.2d 929 (2012).
- 3 [State v. Marmon Industries, Inc.](#), 456 So. 2d 798 (Ala. Civ. App. 1984).
- 4 [Rich-Taubman Associates v. Commissioner of Revenue Services](#), 236 Conn. 613, 674 A.2d 805 (1996); [Spokane Research & Defense Fund v. Spokane County](#), 139 Wash. App. 450, 160 P.3d 1096 (Div. 3 2007), as amended on reconsideration, (Oct. 23, 2007).
- 5 [Greater New Orleans Expressway Com'n v. Board of Tax Appeals](#), 681 So. 2d 957 (La. Ct. App. 5th Cir. 1996).
- 6 [Lombard Public Facilities Corp. v. Department of Revenue](#), 378 Ill. App. 3d 921, 317 Ill. Dec. 430, 881 N.E.2d 598 (2d Dist. 2008).
- 7 [NERAC, Inc. v. Meehan](#), 44 Conn. Supp. 328, 690 A.2d 440 (Super. Tax 1995).
- 8 [National Serv-All, Inc. v. Indiana Dept. of State Revenue](#), 644 N.E.2d 954 (Ind. Tax Ct. 1994).
- As to the liability of government contractors for use taxes, generally, see § 198.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 198

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 198. Liability of government contractors for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3669

In order to assert federal government immunity from the use tax, a contractor for the United States must be deemed an agency or instrumentality so closely connected to the federal government that the two cannot realistically be viewed as separate entities insofar as the activity being taxed is concerned.¹ Immunity may not be conferred on a contractor simply because a use tax will have an effect on the United States or even because the federal government has agreed to shoulder the entire economic burden of the levy.² Thus, when a use tax is involved, immunity cannot be conferred simply because the state is levying the tax on the use of the federal property in private hands even if the private entity is using the government property to provide the United States with goods or services. In such a situation, the contractor's use of the property in connection with commercial activities carried on for profit is a separate and distinct taxable activity. Similarly, immunity cannot be conferred simply because the use tax falls on the earnings of a contractor providing services to the government or because the use tax is paid with government funds under an advanced funding arrangement.³

Construction contractors designated as federal government contractors generally are considered consumers of and are therefore subject to use taxes for materials or fixtures they furnish and install in the performance of contracts with the federal government.⁴ However, when the title to tangible personal property passes to the federal government before a contractor makes any use of it, the use tax does not apply.⁵

A taxpayer performing under a contract with the government must exercise sufficient dominion or control to acquire an ownership interest in the personal property bought in performance of the contract in order to be subject to the imposition of the use tax.⁶

Practice Tip:

A controlling factor for determining whether the exemption applies is whether the contractor installs the materials that it sells; if the contractor does so, the contractor is not an agent of the government and is thus subject to the use tax.⁷

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Arizona Dept. of Revenue v. Blaze Const. Co., Inc.](#), 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999); [State v. Kelly-Ryan, Inc.](#), 110 Nev. 276, 871 P.2d 331 (1994).
- 2 [U. S. v. New Mexico](#), 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982); [State v. Kelly-Ryan, Inc.](#), 110 Nev. 276, 871 P.2d 331 (1994); [Northern X-Ray Co., Inc. v. State By and Through Hanson](#), 542 N.W.2d 733 (N.D. 1996).
- 3 [U. S. v. New Mexico](#), 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).
- 4 [State v. Kelly-Ryan, Inc.](#), 110 Nev. 276, 871 P.2d 331 (1994); [NLO, Inc. v. Limbach](#), 66 Ohio St. 3d 389, 613 N.E.2d 193 (1993); [Morpho Detection, Inc. v. State, Dept. of Revenue](#), 194 Wash. App. 17, 371 P.3d 101 (Div. 1 2016).
- 5 [Overhead Electric Co. v. State Bd. of Equalization](#), 227 Cal. App. 3d 1230, 278 Cal. Rptr. 112 (2d Dist. 1991); [United Technologies Corp. v. Groppo](#), 238 Conn. 761, 680 A.2d 1297 (1996); [Olin Corp. v. Director of Revenue](#), 945 S.W.2d 442 (Mo. 1997).
- 6 [Stretar Masonry Co., Inc. v. Commissioner of Revenue](#), 518 N.W.2d 29 (Minn. 1994); [Olin Corp. v. Director of Revenue](#), 945 S.W.2d 442 (Mo. 1997).
- 7 [State v. Wyoming State Bd. of Equalization](#), 891 P.2d 68, 98 Ed. Law Rep. 1029 (Wyo. 1995).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 199

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 199. Liability of Indian/Native-American reservations for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3612

A.L.R. Library

[Preemption of State Law by Indian Gaming Regulatory Act](#), 27 A.L.R. Fed. 2d 93

Absent a federal statute permitting it, a state is without power to tax reservation lands and reservation Indians. If the legal incidence of a state tax falls on a tribe or its members for sales made within Indian country, the tax is categorically unenforceable, without regard to its economic realities.¹ If the legal incidence of a state tax falls on a tribe or its members for sales made within Indian country, the tax is categorically unenforceable, without regard to its economic realities. However, the per se rule against state taxation of reservation Indians does not apply to a use tax where the legal incidence of the use tax falls on nonmember purchasers of goods and services at a casino and store operated by a federally recognized Indian tribe which are located on reservation lands.²

When a state seeks to impose a nondiscriminatory tax on the actions of nonmembers on tribal land, its authority is not categorically limited; instead, a flexible analysis is applied to determine whether state taxation of nonmembers on Indian land is proper, often called the "Bracker balancing test."³ In determining whether state taxation of nonmembers on Indian land is proper, each case requires a particularized examination of the relevant state, federal, and tribal interests. In most cases, because Indian tribes are dependent sovereigns, the issue of whether state taxation of nonmembers on Indian land is proper turns on whether federal legislation has preempted state taxation of nonmember activity on Indian land, which is primarily an exercise in examining congressional intent. Because of the long-recognized importance of tribal sovereignty, questions of preemption

of Indian tax immunity are not resolved by reference to standards of preemption that have developed in other areas of the law, and are not controlled by mechanical or absolute conceptions of state or tribal sovereignty; instead, Indian tax immunity jurisprudence relies heavily on the significant geographical component of tribal sovereignty, which provides a backdrop against which the applicable treaties and federal statutes must be read.⁴

A state seeking to impose a tax on a transaction between a tribe and nonmembers must generally point to more than its general interest in raising revenues.⁵ A state's generalized interest in raising revenues to provide government services throughout the state did not outweigh federal and tribal interests in casino gaming reflected in the Indian Gaming Regulatory Act and the history of tribal independence in gaming, and thus the imposition of the state's use tax on nonmember purchases of amenities, including food and beverage services, hotel, recreational vehicle park, live entertainment events, and gift shop items, at a casino owned and operated by a federally recognized Indian tribe on reservation lands was preempted by federal law; the economic burden of tax fell on the tribe, and amenities operated at a loss but contributed significantly to the economic success of the tribe's gaming at casino.⁶

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 § 18.
As to the sovereign nature of Indian tribes or nations, see Am. Jur. 2d, Indians; Native Americans §§ 9 to 17. As to the taxation relationship between state governments and Indian tribes, see Am. Jur. 2d, Indians; Native Americans §§ 44 to 47.
- 2 Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019), cert. denied, 2020 WL 2621731 (U.S. 2020).
- 3 § 18.
- 4 Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019), cert. denied, 2020 WL 2621731 (U.S. 2020).
- 5 Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019), cert. denied, 2020 WL 2621731 (U.S. 2020).
- 6 Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019), cert. denied, 2020 WL 2621731 (U.S. 2020).
As to the federal regulation of Indian gaming, see Am. Jur. 2d, Indians; Native Americans § 37.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

67B Am. Jur. 2d Sales and Use Taxes § 200

American Jurisprudence, Second Edition | May 2021 Update

Sales and Use Taxes

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

II. Use Taxes

E. Persons Liable for Use Tax; Uses by Particular Persons or Entities

§ 200. Liability of charitable, religious, or educational institution for use tax

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Taxation](#)  3664

A.L.R. Library

[Exemption of charitable or educational organization from sales or use tax, 69 A.L.R.5th 477](#)

[Exemption of religious organization from sales or use tax, 54 A.L.R.3d 1204](#)

Use-tax statutes may exempt the uses of tangible personal property by organizations serving the public interest such as charitable, religious, or educational organizations.¹ However, religious organizations and institutions are not exempt from the use tax when the statute does not so provide.²

Caution:

That an entity is a nonprofit corporation does not automatically qualify it for a tax exemption as a purely public charity.³ The use tax is purely an excise tax and therefore beyond the scope of the tax exemption accorded to institutions of purely public charity in the State Constitution.⁴

In some states, nonprofit organizations not specifically exempted from the payment of the use tax are accountable for the payment of such a tax on their purchases unless the purchase falls directly under a specific exemption statute.⁵ While it has been considered irrelevant whether the organization is recognized as an exempt charity for federal income tax purposes,⁶ there is authority to the contrary.⁷

The plain language of a statute exempting fraternal societies from taxation exempts taxes on the "funds" of a fraternal benefit society, but it does not exempt the fraternal benefit society from sales and use taxes, because such taxes are imposed on its retail purchase activity, not on its funds.⁸

© 2021 Thomson Reuters. 33-34B © 2021 Thomson Reuters/RIA. No Claim to Orig. U.S. Govt. Works. All rights reserved.

Footnotes

- 1 [Catholic Health Initiatives Colorado v. City of Pueblo, Dept. of Finance](#), 207 P.3d 812 (Colo. 2009), as modified on denial of reh'g, (June 1, 2009); [Meridian Village Ass'n v. Hamer](#), 380 Ill. Dec. 54, 7 N.E.3d 917 (App. Ct. 5th Dist. 2014); [Lynnwood Foundation v. North Carolina Dept. of Revenue](#), 190 N.C. App. 593, 660 S.E.2d 611 (2008).
As to what organizations qualify as charitable organizations, generally, see [Am. Jur. 2d, Charities](#) §§ 167 to 172.
- 2 [Jimmy Swaggart Ministries v. Board of Equalization of California](#), 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990).
As to the effect of the free exercise and establishment provisions of the First Amendment on a state's right to impose a use tax on religious organizations, generally, see [§ 162](#).
- 3 [Sacred Heart Healthcare System v. Com.](#), 673 A.2d 1021 (Pa. Commw. Ct. 1996).
- 4 [Commonwealth v. Interstate Gas Supply, Inc. for Use and Benefit of Tri-State Healthcare Laundry, Inc.](#), 554 S.W.3d 831 (Ky. 2018).
- 5 [Hope Evangelical Lutheran Church v. Iowa Dept. of Revenue and Finance](#), 463 N.W.2d 76 (Iowa 1990).
- 6 [Missouri State USBC Ass'n v. Director of Revenue](#), 250 S.W.3d 362 (Mo. 2008); [Sacred Heart Healthcare System v. Com.](#), 673 A.2d 1021 (Pa. Commw. Ct. 1996).
- 7 [Catholic Health Initiatives Colorado v. City of Pueblo, Dept. of Finance](#), 207 P.3d 812 (Colo. 2009), as modified on denial of reh'g, (June 1, 2009).
- 8 [Woodmen of the World Life Insurance Society v. Nebraska Department of Revenue](#), 299 Neb. 43, 907 N.W.2d 1 (2018).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.